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IN THE

Supreme Court of the United States

October Term, 1963.

No. 307.

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; et als.,

Appellants,

v.

RICHARD SINCOCK, et als.

On Appeal From the United States District Court for the District of Delaware.

BRIEF FOR THE APPELLEES.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statutes and Constitutional Provisions Involved	3
Statement of the Case	4
1. Apportionment in the General Assembly Under Article II, Section 2 of the Constitution of the State of Delaware, of 1897; the Growth of Population, 1890-1960	4
2. Representation in the House of Representatives of the Delaware General Assembly Under Article II, Section 2 From 1897 Through 1960	6
3. Representation in the Senate of the Delaware General Assembly Under Article II, Section 2 From 1930 to 1960	9
4. The Amendment of 1963	11
(a) Representation in the House of Representatives of the Delaware General Assembly Under the Amendment	12
(b) Representation in the Senate of the Delaware General Assembly Under the Amendment	15
5. Tax Revenues Contributed by New Castle, Kent and Sussex Counties in the Decade 1952 to 1961	17
6. Futile Efforts to Achieve Legislative Reapportionment in the Absence of a Controlling Court Decision	18
7. The Proceedings Below	20
8. The Decision of the District Court	22
Summary of Argument	24

INDEX (Continued).

	Page
ARGUMENT	29
I. The Equal Protection Clause Is Violated by the Gross Inequalities in Per Capita Representation Without Any Rational Basis Which Exists Under Article 2, Section 2 of the Constitution of the State of Delaware Both Before and After Amendment	29
A. The Guarantees of the Fourteenth Amendment Are Applicable to the Apportionment of State Legislatures	29
B. The Well-Developed and Traditional Tests of the Fourteenth Amendment Are Available to Determine Whether Invidious Discrimination Exists	31
C. Invidious Discrimination Exists in Representation of Both Houses of the General Assembly of the State of Delaware	33
D. The Defendants Can Offer No Rhyme or Reason for the Gross Inequalities in the Representation That Exit Under the Apportionment Plan of the Constitution of 1897 and the Amendment Thereto, and Reliance Upon the So-Called Federal Analogy Is Misplaced	37
1. The History of Delaware Is Irrelevant to the Questions Before This Court and Has No Application to the Present Question of Whether the Apportionment of the General Assembly of the State of Delaware Meets the Developed Standards of the Equal Protection Clause	37
2. Reliance Upon the Supposed Analogy Between the Legislative Body of a State and the Congress of the United States Is Misplaced	43

INDEX (Continued).

Page

E. In Delineating the Application of the Equal Protection Clause of the Fourteenth Amendment, Nothing Is to Be Gained by Turning the Clock Back to 1868 When the Amendment Was Adopted, But the Right to Equal Suffrage Must Be Considered in the Light of Its Full Development and Its Present Place in American Life Throughout the Nation 47

F. The Discriminations in Per Capita Representation Present in the 1963 Amendment Are Haphazard, Crazy-Quilt, and Not Susceptible of Classification and Are Therefore Inconsistent With the Well-Settled Interpretations of the Equal Protection Clause 59

1. The Appellees Agree With the General Principle That the Equal Protection Clause Does Not Strike Down Classifications That Have a Reasonable Basis But Deny the Existence in This Case of Reasonable Classifications 59

2. There Is No Reasonable Basis for Representation in the Delaware House of Representation in the Apportionment Scheme Contained in the 1963 Amendment 61

3. No Reasonable Classification Under the Equal Protection Clause Is to Be Found in the 1963 Amendment Which Purportedly Reapportioned the Delaware Senate 62

II. The Entry of the Permanent Injunction Restraining the Holding of Any Election Pertaining to the General Assembly Under Article II, Section 2 of the Constitution of 1897 as Amended Which Had Been Declared to Be in Violation of the Fourteenth Amendment Was Not a Gross Abuse of Judicial Power But Was Within the Sound Discretion of the Trial Court 65

INDEX (Continued).

Page

A. The Injunction Entered by the District Court Was Proper Equitable Relief and Was Not an Abuse of Discretion 65

B. There Is Nothing in the Record Below to Justify the Hysterical Harangue in the Appellants' Brief Which Charges the Members of the Court Below With Undue Pressure, Haste and Compulsion on the Appellants 69

C. Neither the Decree Nor the Injunction Below Prevent the General Assembly of the State of Delaware From Enacting Appropriate Apportionment Provisions Which Would Meet the Tests of the Equal Protection Clause 77

D. The Record Shows No Compulsion of the District Court to Apportion the Delaware General Assembly by Decree—to the Contrary It Shows the Court's Reluctance to Accept Such Burden—Until Requested by the Defendants to Establish Guide Lines 79

CONCLUSION 84

CASES CITED.

Page

Asbury Park Press, Inc. v. Woolley, 33 N. J. 1, 161 A. 2d 705, 710 ..... 30, 68

Baker v. Carr, 206 F. Supp. 341 (M. D. Tenn.) 30, 68

Baker v. Carr, 369 U. S. 186 ..... 24, 29, 30, 31, 48, 50, 55, 56, 62, 71, 79

Brown v. Board of Education, 347 U. S. 483 ..... 47, 49, 51, 55

Butcher v. Trimarchi, 28 Pa. Dist. County Rep. 2d 537, 542 68

Caesar v. Williams, 371 P. 2d 241 (Idaho Sup. Ct.) 30

The Civil Rights Cases, 109 U. S. 3 50

Davis v. Synhorst, 217 F. Supp. 492 (S. D. Iowa) 30

Fishman v. White, Superior Ct., Suffolk Cty., Mass. 30

Fortner v. Barnett, No. 59,965, Chancery Ct., First Judicial Dist. of Hinds Cty., Miss. 30, 68, 69

Goesaret v. Cleary, 335 U. S. 464 32

Gray v. Saunders, 372 U. S. 368 ..... 29, 31, 44

Harris v. Shanahan, Dist. Ct., Shawnee Cty., Kan. 30, 68

Hunter v. City of Pittsburgh, 207 U. S. 161 43

Jackman v. Bodine, 78 N. J. Super. 414, 188 A. 2d 642 30

League of Nebraska Municipalities v. Marsh, 209 F. Supp. 189 (D. Neb.) 30, 68

In re Legislative Reapportionment, 374 P. 2d 66, 71-72 (Colo. Sup. Ct.) 68

Lein v. Sathre, 205 F. Supp. 536, 540 (D. N. D.) 68

Levitt v. Maynard, 104 N. H. 243, 182 A. 2d 897 30

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-79 32

Lisco v. McNichols, 208 F. Supp. 471 (D. Colo.) 30, 35

MacDougall v. Green, 335 U. S. 281 64

Magraw v. Donovan, 163 F. Supp. 184, 187-188 (D. Minn.) 68

Mann v. Davis, 213 F. Supp. 577 (E. D. Va.), pending on appeal No. 69, this term 30, 68

Maryland Committee for Fair Representation v. Tawes, Maryland, decided May 24, 1962; Circuit Court, Anne Arundel County 68

Maryland Committee for Fair Representation v. Tawes, 229 Md. 406, 184 A. 2d 715 ..... 30, 50

Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 180 A. 2d 656 ..... 30, 71

CASES CITED (Continued)..

	Page
McGowan v. Maryland, 366 U. S. 420	32
Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661, 670	67
Mikell v. Rousseau, 183 A. 2d 817, 823 (Vt. Sup. Ct.)	68
Morey v. Doud, 354 U. S. 457, 463-464	32
Moss v. Burkhart, 207 F. Supp. 885 (W. D. Okla.)	30, 68
Moss v. Burkhart, unreported opinion, July 16, 1963 (W. D. Okla.)	69
Nolan v. Rhodes, U. S. D. C., S. D. Ohio	30
Pennsylvania v. Williams, 294 U. S. 176, 185	67
Phillips Chemical Co. v. Dumas School District, 361 U. S. 376, 385	32
Plessy v. Ferguson, 163 U. S. 537	51
Royster Guano Co. v. Virginia, 253 U. S. 412, 415	32
Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394	50
Saunders v. Wilkins, 152 F. 2d 235, cert. den. 328 U. S. 870, reh. den. 329 U. S. 825 (1946)	55
Scholle v. Hare, 360 Mich. 123, 104 N. W. 2d 63	44
Scholle v. Secretary of State, 367 Mich. 176, 116 N. W. 2d 350	30
Sims v. Frink, 208 F. Supp. 431 (M. D. Ala.), pending on appeal, sub nom. Reynolds v. Sims, Nos. 23, 27, 41, this term	30, 69
Skinner v. Oklahoma, 316 U. S. 535	32
The Slaughter House Cases, 16 Wall. 36 (83 U. S. 394)	51
Smith v. Allwright, 321 U. S. 649	29
Sobel v. Adams, 208 F. Supp. 316 (S. D. Fla.)	30, 68
Sweeney v. Notte, 183 A. 2d 296 (R. I. Sup. Ct.)	30
Terry v. Adams, 345 U. S. 461	29
Texas v. White, 7 Wall. 700, 19 L. Ed. 227	52
Thigpen v. Meyers, 211 F. Supp. 826 (W. D. Wash.), pending on appeal No. 381	30, 68
Toombs v. Fortson, 205 F. Supp. 248 (N. D. Ga.)	30, 54, 68
United States v. States of Louisiana, etc., 363 U. S. 1	47
Virginia v. West Virginia, 241 U. S. 531	76

CASES CITED (Continued).

	Page
Virginia Railroad Company v. System Federation No. 40, 300 U. S. 545, 552	67
Watson v. City of Memphis, 373 U. S. 526	75, 76
Wisconsin v. Zimmerman, 209 F. Supp. 183 (W. D. Wis.)	30
WMCA, Inc. v. Simon, 208 F. Supp. 368 (S. D. N. Y.)	30

CONSTITUTIONAL PROVISIONS.

	Page
Constitution of the United States:	
Article I	43, 44
Article IV, § 4	48
Fourteenth Amendment	3, 26, 27, 28, 29, 31, 32, 35, 36, 37, 38, 43, 44, 45, 47, 48, 50, 51, 52, 54, 55, 56, 57, 58, 59, 65, 77
§ 1	3, 4, 20, 24, 27, 28, 29, 47, 51, 55, 56, 76
§ 5	3
Delaware Constitution 1897:	
Art. I, § 3	3, 21
Art. II, § 2	3, 4, 6, 9, 11, 12, 20, 21, 22, 25, 29, 31, 33, 35, 37, 38, 46, 65, 70, 72, 78
Art. XVI	18, 78
§ 1	3, 18
§ 2	3, 19
Amendment of 1963	3, 4, 6, 9, 11, 13, 14, 15, 16, 18, 20, 21, 22, 25, 26, 28, 29, 31, 33, 34, 35, 36, 37, 38, 59, 60, 61, 62, 63, 64, 65, 66
Schedule of the Constitution of the State of Delaware of 1897, § 2	5

STATUTES.

Statutes of the United States.

	Page
Sec. 1849 Rev. Stat. 1878 (Title 23, Ch. I)	57
28 U. S. C. § 1253	2
28 U. S. C. § 1343	4
28 U. S. C. § 2101(b)	2
28 U. S. C. § 2201	4
28 U. S. C. § 2284	70, 76
42 U. S. C. § 1983	4
42 U. S. C. § 1988	4

Incomplete Legislative Actions.

House Bill 116	20
House Bill 164, 1959	19
House Bill 165, 1959	19
House Bill 361, 1961	19
Senate Substitute Bill #2 for Senate Bill #3	19
Senate Bill #3	19
Senate Bill #365	20

MICELLANEOUS.

	Page
Coutler, The South During Reconstruction, 1867-77, Vol. VIII, in A History of the South, La. State U., Press, 1947, pp. 137-138	52, 53
Debates and Proceedings of the Constitutional Convention of the State of Delaware, p. 1853	42
DeGrazi, Public and Republic, 1951, p. 160	53
Delaware Register, Annals of Delaware, Vol. 1, Page 290	39
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James, Framing of the Fourteenth Amendment (1956, University of Illinois)	50
Manlove Hayes, William Penn and His Province, Historical Society of Delaware, 1898, p. 22	39
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2 Scharf, History of Delaware, p. 1028	39
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 307.

MABEL V. ROMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY, WALTER A. HANDSBERRY, CLERK OF THE PEACE FOR KENT COUNTY; I. ROBERT WILLEY, CLERK OF THE PEACE FOR SUSSEX COUNTY, ET ALS.,

Appellants,

v.

RICHARD SINCOCK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

BRIEF FOR THE APPELLEES.

OPINIONS BELOW.

The opinion of the Court Below which:

1. Granted a limited stay is reported at 207 Fed. Supp. 205 and appears as A(1) of the Appendix to the jurisdictional statement.[1]

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1. References to the brief of Appellants will appear as App. B.

References to the Appendix to the Brief of Appellants will appear as Del. App.

References to the Jurisdictional Statement will appear as J. S.

References to the Appendix to the Jurisdictional Statement will appear as J. S. A. —.

Reference to the Appendix to the Brief of the Appellees will appear as Sincock App.

References to the Complaint will appear as Compl., para. —.

2. Denied the Motions to Dismiss is reported at 210 F. Supp. 395 and appears as 9A(2) of the J. S. A. A6-A8.

3. Denied Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion for a Further Stay is reported at 210 F. Supp. 396 and appears at J. S. A. A8-A16.

4. Held the apportionment provisions of the Constitution of the State of Delaware of 1897 and the amendments thereto to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is reported at 215 F. Supp. 169 and appears at J. S. A. A16-A67.

JURISDICTION.

The opinion of the statutory court was filed on April 17, 1963 (J. S. A. A16-A67). The decree thereon was entered on April 30, 1963 (J. S. A. A68). Notice of Appeal to this Court from such final Order was filed on May 28, 1963.

A permanent injunction issued on May 20, 1963 (J. S. A. A69). The Defendants' Motion for a Stay of that injunction was denied in an Order entered June 10, 1963. On June 12, 1963, the Defendants Below filed their Notice of Appeal to this Court appealing from the injunction of May 20, and the Order of June 10, 1963, denying the stay of the injunction pending the appeal. On June 27, 1963, Mr. Justice Brennan stayed the injunction of May 20, 1963 pending the perfection of the appeals and the final disposition by this Court. Probable jurisdiction was noted by this Court on October 21, 1963. The jurisdiction of this Court rests upon 28 U. S. C., Secs. 1253 and 2101(b).

QUESTIONS PRESENTED.

1. Whether the apportionment provisions contained in Article II, Section 2 of the Constitution of the State of Delaware of 1897, or the amendment thereto, which apportioned both Houses of the Delaware legislature, violates the Equal Protection Clause of the Fourteenth Amendment by creating gross inequalities in per capita representation without any rational basis.

2. Whether the Court below abused its discretion in entering an injunction restraining the holding of any election pertaining to the members of the General Assembly under Article II, Section 2 of the Constitution of the State of Delaware of 1897 as it existed prior to amendment or as amended, on the ground that such provisions violate the Fourteenth Amendment to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States containing the Equal Protection and Due Process Clause (J. S. A. A71).
2. Section 5 of the Fourteenth Amendment to the Constitution of the United States (J. S. A. A71).
3. Article I, Section 3 of the Constitution of the State of Delaware of 1897.
4. Article II, Section 2 of the Constitution of the State of Delaware of 1897 (J. S. A. A71-A75).
5. Article II, Section 2 of the Constitution of the State of Delaware of 1897, as amended (J. S. A. A77-A81).
6. Article XVI, Section 1 of the Constituion of the State of Delaware of 1897 (J. S. A. A76-A77).
7. Article XVI, Section 2 of the Constitution of the State of Delaware of 1897 (J. S. A. A76-A77).

STATEMENT OF THE CASE.

1. Apportionment in the General Assembly Under Article II, Section 2 of the Constitution of the State of Delaware, of 1897; The Growth of Population, 1890-1960.

This is a class action brought by seven duly qualified citizens, taxpayers, and voters of urban and suburban New Castle County and the State of Delaware, seeking an adjudication that Article II, Section 2 of the Constitution of the State of Delaware of 1897 and the 1963 Amendment thereto are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (Sincock App. 6a; J. S. A. A19).

The Defendants comprise, the Board of Canvass, the Clerks of Peace, the Departments of Election, and their Secretaries of New Castle County, Sussex County and Kent County respectively, and the State Election Commissioner, all of whom perform statutory and constitutional duties relating to the conduct of the general elections in the State of Delaware [2] (Sincock App. 7a; J. S. A. A19).

The Complaint alleges violations of the Civil Rights Act, 42 U. S. C., Sections 1983 and 1988; jurisdiction is asserted under 28 U. S. C., Section 1343. The Plaintiffs sought an injunction and also relief under 28 U. S. C., Section 2201 (Compl. para. 1; Sincock App. 5a-6a).

The Complaint attacked those provisions of the Constitution of the State of Delaware of 1897 which provide for the apportionment of seats in the General Assembly of the State of Delaware—the State's bicameral legislative body (Sincock App. 3a; J. S. A. A18) Article II, Section 2 as it existed at the time of suit, divided Delaware into

2. The Chancellor of Delaware and the Judges of the Superior Court of the State of Delaware, Members of the Boards of Canvass, in their Answers concluded that it would be inappropriate to take a position on the merits but that they would continue to discharge the duties imposed upon them by the Constitution of the State of Delaware unless restrained by lawful order of the Court below. They have not appealed from either the Final Decree, the Injunction, or the Denial of the Motion to Stay filed by the other Defendants, (J. S. A. A18).

thirty-five (35) geographical representative districts, and seventeen (17) geographical senatorial districts[3] (Sincock App. 7a; J. S. A. A20).

The boundaries of both the representative and senatorial districts were specifically described in the Constitutional provisions and no provision was made for their alteration (Sincock App. 7a-8a; J. S. A. A20). The qualified voters of each representative district elect one representative, and the qualified voters of each senatorial district elect one senator (Sincock App. 7a; J. S. A. A20). The apportionment in both instances was made on the basis of geographical districts and not to counties (J. S. A. A71-A75, A77-A81). This apportionment was the result of the Constitutional Convention convened on December 1, 1896, and became effective June 10, 1897 (Section 2, Schedule of the Constitution of the State of Delaware, of 1897 (Sincock App. 7a-8a; J. S. A. A20).

At the time of the adoption of the Constitution, the population of Delaware was approximately 180,000 inhabitants of which 105,000 resided in New Castle County, 70,000 of whom resided in the City of Wilmington, 35,000 resided in rural New Castle County, and 32,000 resided in Kent County, and 38,000 resided in Sussex County (Sincock App. 8a; J. S. A. A20-A21). When the Constitution of 1897 was adopted, the inhabitants of the rural areas of New Castle, Kent and Sussex Counties were considered to be identical in their occupations and vocations, and population in such areas was substantially equal (Sincock App. 8a; J. S. A. A21). The Convention apportioned the rural areas into ten representative districts and five senatorial districts in the General Assembly (Sincock App. 8a; J. S. A. A21). Wilmington, with a population of 70,000 persons, was accorded special consideration and allotted five representatives in the House of Representatives and two senators in the Senate of the General Assembly (Sincock App. 9a; J. S. A. A21).

3. The senatorial districts were in large measure combinations of smaller representative districts (J. S. A. A73-A75).

By April 1, 1930, according to the 15th Decennial Census of the United States, the population of Delaware had increased to 238,380 which represented an increase of 15,374 or 6.9%, as compared with the population on January 1, 1920 (Sincock App. 9a; J. S. A. A21). In 1930, New Castle County had grown to 161,032 inhabitants, of which 106,597 resided in Wilmington, 54,435 resided in rural New Castle County, while Kent County had a population of 31,841, and Sussex County had a population of 45,507 (Sincock App. 9a; J. S. A. A21-A22).

By 1960, the total population of the State of Delaware had increased to 446,292 of which 307,446 resided in New Castle County. Of these, 95,827 resided in Wilmington, and 211,619 resided in rural New Castle County. In the same year, 65,651 persons resided in Kent County and 73,195 persons inhabited Sussex County[4] (Sincock App. 9a; J. S. A. A22). Using the 1897 and 1960 population figures as a basis to calculate the percentage of population growth among the three counties shows: in 1897 rural New Castle County had approximately 20% of the population, Kent County had approximately 18%, Sussex County had approximately 21% of the population and the City of Wilmington had approximately 41% (J. S. A. A22). In 1960, however, rural New Castle County had approximately 47% of the population, Kent County had approximately 14%, and Sussex County had approximately 16%, and the City of Wilmington had approximately 21% (J. S. A. A22).

2. Representation in the House of Representatives of the Delaware General Assembly Under Article II, Section 2 From 1897 Through 1960.

The apportionment of the 35 Representative Districts established by Section 2 of Article II of the Constitution of 1897 as it existed prior to the 1963 Amendment for the years 1890 through 1969 was as follows:[5]

4. See graphic illustration showing population growth of State and Counties 1890-1960: Sincock App. 77a.

5. See illustration: Sincock App. 76a.

Dist.	1890	1900	1910	1920	1930	1940	1950	1960
New Castle County								
The City of Wilmington								
1					11,513	12,262	11,515	7,814
2					31,299	35,082	35,762	33,772
3					21,222	22,843	21,417	18,359
4					9,352	9,877	9,078	5,394
5					31,446	32,440	32,584	30,488
Total	61,431	76,508	87,411	110,168	106,597	112,504	110,356	95,827
New Castle County (*Excluding Wilmington*)								
6	3,994	3,899	4,440	6,451	10,917	14,426	24,039	58,228
7	6,144	4,736	6,038	6,298	14,317	18,696	32,224	47,509
8	3,786	3,728	3,886	4,052	4,453	5,662	7,677	23,428
9	2,870	3,061	3,587	3,921	5,476	6,398	9,057	20,040
10	5,980	5,407	5,406	6,386	8,261	10,245	21,824	40,293
11	2,126	1,999	1,797	1,692	1,881	1,970	2,599	9,325
12	2,216	2,425	2,693	2,351	2,635	2,771	3,053	3,401
13	4,785	4,455	4,237	3,596	3,457	3,685	4,554	5,218
14	2,336	2,141	2,257	2,099	1,939	2,035	2,175	2,534
15	1,514	1,338	1,436	1,225	1,099	1,170	1,321	1,643
Total New Castle County Excluding Wilmington					54,435	67,058	108,523	211,619
Total New Castle County	97,182	109,697	123,188	148,239	161,032	179,562	218,879	307,446
Kent County								
1	4,372	4,228	3,627	3,521	3,229	3,506	4,422	6,084
2			3,046	2,623	3,133	3,530	4,248	17,806
3	2,885	3,144	3,032	2,831	2,586	2,527	2,671	3,361
4			2,709	2,439	2,292	2,502	2,555	3,716
5			3,771	3,927	4,363	5,169	5,052	9,125
6		1,242	2,941	2,500	2,352	2,274	2,168	2,626
7			3,252	3,229	3,393	3,745	3,838	7,880
8			3,331	3,000	3,040	3,200	3,269	5,168
9			3,945	3,920	4,043	4,288	4,418	4,956
10	3,364	3,118	3,067	3,033	3,410	3,700	4,229	4,929
Total Kent County			32,721	31,023	31,841	34,441	37,870	65,651
Sussex County								
1	3,913	4,117	5,060	5,079	5,276	5,936	7,254	9,641
2	2,793	3,456	5,329	4,589	4,329	5,315	5,849	6,439
3	3,223	3,779	5,174	5,346	5,182	6,350	7,815	9,437
4	3,0.	3,132	3,352	2,761	2,955	3,448	4,446	5,318
5	4,511	5,112	5,980	6,362	6,319	6,804	7,139	8,140
6	3,495	3,575	4,979	4,513	4,836	5,779	6,470	8,010
7			4,770	4,016	4,755	5,415	6,195	6,623
8			1,884	1,821	1,803	1,864	2,536	2,957
9	2,436	2,874	3,028	3,071	3,062	3,456	3,563	4,271
10	2,907	3,959	6,857	6,183	6,990	8,135	10,069	12,359
Total Sussex County			46,413	43,741	45,507	52,502	61,336	73,195

(Sincock App. 10a, J. S. A. A23-A24.)

It is stipulated, in the Pre-Trial Order and found by the Court below that the allegations in Paragraphs 21, 22, 23, and 24 contained in the Complaint relating to the disparities of vote and representation in the various districts are true, accurate and correct. Thus, by 1960, as a result of the change in population in the 35 representative districts, they ranged in size from 1,643 inhabitants of New Castle County's 15th Representative District of Blackbird Hundred to 58,228 inhabitants of New Castle County's 6th Representative District of Brandywine Hundred. At the time of the 1962 general election, a vote in the 15th Representative District was equal to one vote in the 6th Representative District in New Castle County, although the population of the latter district is approximately 35 times greater than that of the former [6] (Compl. Paras. 15, 21, 22, 23 and 24; Sincock App. 11a; J. S. A. A24).

Eighteen representative districts with the least population and containing only approximately 18½% of the state's population may elect a majority of the members of the House of Representatives. Inhabitants of the 18 least populated representative districts are less in number than those of the two districts having the heaviest concentration of population; nevertheless, the former elect eighteen representatives in the House of Representatives, while the latter elect but two representatives in the House of Representatives of the Delaware General Assembly (Compl. Para. 23, Sincock App. 11a; J. S. A. A25).

The 1960 census shows that more than one-half of the entire population of the State of Delaware, 233,718 persons, live in six representative districts, with the representatives of those districts having the same voting power in the General Assembly as the representatives of 16,552 persons residing in the six least populous representative districts

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6. For comparative value of vote for representation see: Sincock App. 78a.

of the State of Delaware[7] (Compl. Para. 24, Sincock App. 11a; J. S. A. A25).

3. Representation in the Senate of the Delaware General Assembly Under Article II, Section 2 from 1930 to 1960.

A similar situation existed prior to the 1963 Amendment with regard to the senatorial districts established by the Constitution of 1897. Seven geographical senatorial districts were apportioned to New Castle County, which had a 1960 population of 307,446 as compared with five senators allotted to senatorial districts located in Kent County having a population of 65,651 and with five senators allocated to five senatorial districts in Sussex County with a population of 73,195. Of the seven senators representing districts in New Castle County, five represent rural areas having a population of 211,619. The City of Wilmington, with a population of 95,827 was allotted two senatorial districts and two senators in the General Assembly, as contrasted with five senators each from senatorial districts in Kent, Sussex, and rural New Castle Counties (Compl. Para. 25, Sincock App. 12a; J. S. A. A25-A26).

The seventeen senatorial districts established by Section 2, Article II of the Constitution of the State of Delaware of 1897 as existed prior to the amendment varied greatly in the number of inhabitants residing in them. The population of these districts from 1930 through 1960, with the percentage of change in each was as follows:[8]

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7. See comparison of representation Counties with greater than 100,000 inhabitants *vis-à-vis* Counties with less than 100,000 inhabitants: Sincock App. 79a.

8. For graphic presentation showing population per Senatorial District see: Sincock App. 82a.

		Population				% Change		
County	*Dist.*	*1930*	*1940*	*1950*	*1960*	*1940/ 1930*	*1950/ 1940*	*1960/ 1950*
New Castle	1	52,521	57,925	57,089	52,131	+ 10	— 1	— 9
	2	54,076	54,579	53,177	43,696	+ 1	— 3	— 18
	3	12,778	16,856	28,228	64,345	+ 32	+ 67	+ 128
	4	16,909	21,928	35,712	64,829	+ 30	+ 63	+ 81
	5	16,372	19,414	33,934	63,734	+ 19	+ 75	+ 88
	6	5,338	5,655	7,153	14,543	+ 6	+ 26	+ 103
	7	3,038	3,205	3,496	4,177	+ 5	+ 9	+ 19
Kent	1	6,362	7,036	8,670	23,890	+ 11	+ 23	+ 176
	2	4,878	5,029	5,226	7,077	+ 3	+ 4	+ 35
	3	7,756	8,914	9,890	17,005	+ 15	+ 11	+ 72
	4	6,395	6,562	6,586	7,582	+ 3	—	+ 15
	5	6,450	6,900	7,498	10,097	+ 7	+ 9	+ 35
Sussex	1	9,605	11,251	13,103	16,080	+ 17	+ 16	+ 23
	2	8,137	9,798	12,261	14,755	+ 20	+ 25	+ 20
	3	11,155	12,583	13,609	16,150	+ 13	+ 8	+ 19
	4	6,558	7,279	8,731	9,580	+ 11	+ 20	+ 10
	5	10,052	11,591	13,632	16,630	+ 15	+ 18	+ 22

(Sincock App. 12a; J. S. A. A26.)

The 17 senatorial districts varied in 1960 from approximately 65,000 to approximately 4,000 inhabitants (Sincock App. 13a; J. S. A. A26). The vote in the General Assembly of the smallest senatorial district was equal to that of the largest senatorial district which exceeded it in numbers of population by more than 21 times (Sincock App. 13a; J. S. A. A27).

The apportionment established by the Constitution with respect to the Senate permitted 22% of the voters of the State of Delaware to elect a controlling majority in the Delaware Senate (Compl. Para. 25; Sincock App. 13a; J. S. A. A27).

The combined percentage of vote necessary to control both the Senate and the House of Representatives of the General Assembly of the State of Delaware establishes Delaware as ranking among the least representative of the states (Compl. Exhibit C).

The uneven growth of the different areas of the State created a condition in which the numbers of inhabitants in

both representative and senatorial districts differed not only on an *intercounty* basis but also on an *intracounty* basis (Sincock App. 13a; J. S. A. A27). Differences also manifested themselves in the representative districts within the City of Wilmington. For example the 4th Representative District of Wilmington, having 5,394 inhabitants, had the same representation in the House of Representatives of Delaware as the 2nd Representative District with 33,772 inhabitants and the 5th Representative District with 30,488 inhabitants (Sincock App. 13a; J. S. A. A27).

4. The Amendment of 1963.

Subsequent to the commencement of this action, the legislature accomplished an amendment to Section 2, Article II of the Constitution (Sincock App. 13a; J. S. A. A27-A31, A77-A81). The Amendment was passed by two consecutive sessions of the General Assembly.

The effect of the Amendment on the apportionment of the Senate is to freeze the senatorial representation in the seven existing districts in New Castle County and to create two additional senatorial districts in each of Kent and Sussex Counties, increasing the total number of senatorial districts throughout the State from 17 to 21[9] (Sincock App. 13a-14a; J. S. A. A31, A78). Thus, according to the provisions of the Amendment, there would exist 7 senatorial districts in each of the 3 counties (Sincock App. 15a, A34). The Amendment's effect on the House of Representatives is to create 10 additional districts by dividing the existing, more populous districts, and by providing for additional representation for each increment of 15,000 population residing therein, or any major fraction thereof[10] (Sincock App. 13a-14a; J. S. A. A31).

The Amendment, in addition to accomplishing the above, provides further that the composition of any future

9. For graphic illustration showing population of each senatorial district according to the amendment see: Sincock App. 84a.

10. For graphic illustration showing population of each representative district according to the Amendment see: Sincock App. 83a.

Constitutional Convention shall not change because of the reapportionment, but shall consist of a delegate from each of the geographical districts set forth in Article II, Section 2 as created by the Constitution of the State of Delaware of 1897, plus two delegates from each County (J. S. A. A71-A75; J. S. A. A31).

(a) Representation in the House of Representatives of the Delaware General Assembly Under the Amendment.

The effect of the amendment upon the existing representative districts in New Castle County is shown by the following chart:

Dist.	*Pop.*		*Effect of Amend.*	*Average Population Per Representative*
1	7,814		Unchanged	7,814
2	33,772	City	Add 1 Representative	16,886
3	18,359	of	Unchanged	18,359
4	5,394	Wilm.	Unchanged	5,394
5	30,448		Add 1 Representative	15,244
6	58,228		Add 3 Representatives	14,557
7	47,509		Add 2 Representatives	15,836
8	23,428		Add 1 Representative	11,714
9	20,040		Unchanged	20,040
10	40,293		Add 2 Representatives	13,431
11	9,325		Unchanged	9,325
12	3,401		Unchanged	3,401
13	5,218		Unchanged	5,218
14	2,534		Unchanged	2,534
15	1,643		Unchanged	1,643

KENT COUNTY

Dist.	*Pop.*	*Effect of Amend.*	*Average Population Per Representative*
1	6,084	None	6,084
2	17,806	None	17,806
3	3,361	None	3,361
4	3,716	None	3,716
5	9,125	None	9,125
6	2,626	None	2,626
7	7,880	None	7,880
8	5,168	None	5,168
9	4,956	None	4,956
10	4,929	None	4,929

Sussex County			
1	9,641	None	9,641
2	6,439	None	6,439
3	9,437	None	9,437
4	5,318	None	5,318
5	8,140	None	8,140
6	8,010	None	8,010
7	6,623	None	6,623
8	2,957	None	2,957
9	4,271	None	4,271
10	12,359	None	12,359

(Sincock App. 10a, 14a-15a; J. S. A. A32.)

The 1963 Amendment does not effect the apportionment of representation to the existing representative districts in either of Kent or Sussex Counties (Sincock App. 15a; J. S. A. A32).

According to the population of the State of Delaware of 1960, the apportionment effected by the 1963 amendment gives rise to disparities in population per representative district in the area of 12 to 1. The ratio of the 15th Representative District of New Castle, the smallest representative district, to that of every other representative district is set forth in the chart below:

New Castle Districts	*Population*	*Ratio to 15th Rep. Dist. of New Castle*
1	7,814	4-1
2A	16,886	10-1
2B	16,886	10-1
3	18,359	11-1
4	5,394	3-1
5A	15,244	9-1
5B	15,244	9-1
6A	14,557	8-1
6B	14,557	8-1
6C	14,557	8-1
6D	14,557	8-1
7A	15,836	9-1
7B	15,836	9-1
7C	15,836	9-1
8A	11,714	7-1
8B	11,714	7-1
9	20,040	12-1
10A	13,431	8-1
10B	13,431	8-1
10C	13,431	8-1
11	9,325	5-1
12	3,401	2-1
13	5,218	3-1
14	2,534	1-½-1
15	1,643	

Kent Districts	*Population*	*Ratio*
1	6,084	3-½-1
2	17,806	10-½-1
3	3,361	2-1
4	3,716	2-1
5	9,125	5-½-1
6	2,626	1-½-1
7	7,880	4-½-1
8	5,168	3-1
9	4,956	3-1
10	4,929	3-1

Sussex Districts	*Population*	*Ratio*
1	9,641	5-½-1
2	6,439	4-1
3	9,437	5-½-1
4	5,318	3-1
5	8,140	5-1
6	8,010	4-½-1
7	6,623	4-1
8	2,957	2-½-1
9	4,271	2-½-1
10	12,359	11-½-1

(J. S. A. A32)

Since no reapportionment is effected in the representative districts of the House of Representatives in either Kent or Sussex Counties, the disparities in population per representative district which there existed prior to the Amendment, continue to exist. These disparities between population per representative district in Kent County are in the order of 7 to 1, and disparities between the population per representative district in Sussex County are in the order of 4 to 1. In New Castle County, the disparities in population per representative district amount to as much as 12 to 1 (Sincoek App. 15a; J. S. A. A32-A33).

The amended apportionment provisions permit but 28% of the population of the State to elect a majority of the House of Representatives. This 28% of the population lives in the 23 smallest representative districts (J. S. A. A33).

The amended constitutional provisions furthermore have the effect of decreasing the representation which the majority of the population had exercised in the Senate of the General Assembly.

(b) Representation in the Senate of the Delaware General Assembly Under the Amendment.

The Amendment results in a Senate composed of the following:

NEW CASTLE COUNTY

Dist.	Population Per Senatorial District	Effect of 1963 Amendment	Average Pop. Per Senate Dist.
1	52,131	Unchanged	
2	43,696	Unchanged	
3	64,345	Unchanged	
4	64,820	Unchanged	
5	63,734	Unchanged	43,921
6	14,543	Unchanged	
7	4,177	Unchanged	
Total	307,446		

KENT COUNTY

1	23,890	Unchanged	
2	7,077	Unchanged	
3	17,005	Unchanged	
4	7,582	Unchanged	
5	10,097	Unchanged	9,378
6	46,063	Newly Created	
7	19,584		
Total	65,651		

SUSSEX COUNTY

1	16,080	Unchanged	
2	14,755	Unchanged	
3	16,150	Unchanged	10,456
4	9,580	Unchanged	
5	16,630	Unchanged	
6	38,975	Newly Created	
7	34,220		
Total	73,195		

(Sincock App. 15a; J. S. A. A34.)

The population disparities in New Castle County in the 7 senatorial districts range from 4,177 in the 7th Senatorial District to 64,820 inhabitants in the 4th Senatorial District, thus giving rise to a situation where the vote of a person residing in the 7th Senatorial District has more than 15 times the voting power of a resident of the 4th Senatorial District of New Castle County (Sincock App. 16a; J. S. A. A34).

In Kent County the population disparities between districts range from 7,077 inhabitants in the 2nd Senatorial District to 46,063 inhabitants in the 6th Senatorial District, or a ratio of 6½ to 1. In Sussex County, the population disparities between districts range from 9,580 in the 4th Senatorial District to 38,000 in the 6th Senatorial District, or a ratio of more than 4½ to 1. The average population for each senatorial district in the three Counties range from 43,921 in New Castle County for each senator elected to 9,378 in Kent County or a ratio of more than 4½ to 1 between the Counties (Sincock App. 16a; J. S. A. A34).

The election of 7 senators in each county irrespective of population and on the basis of the formula provided by the Amendment to the Constitution creates a situation whereby Kent County with 14½% of the total population of the State of Delaware will elect one-third of the members of the Senate, Sussex County with 16½% of the total population will elect ⅓ of the Senate, while New Castle County with about 69% of the total population will elect ⅓ of the members of the Senate (Sincock App. 16a; J. S. A. A35).

In creating the two additional senatorial districts in each of Kent and Sussex Counties, the legislature has added two at-large senatorial districts in each of these counties. The two at-large senatorial districts are superimposed on existing senatorial districts. By reason of this, each resident of New Castle County is entitled to vote for and elect one senator in the General Assembly of Delaware while each inhabitant of Kent and Sussex County is entitled to vote for and elect two senators to represent him

in the General Assembly (Sincock App. 16a-17a; J. S. A. A35).

5. Tax Revenues Contributed by New Castle, Kent and Sussex Counties in the Decade 1952 to 1961.

In the decade from 1952 through 1961, the State Tax Commission has collected a total of $239,000,000 of which $166,900,000 represented personal income taxes, $23,500,000 represented inheritance and estate taxes, $10,800,000 represented license fees and $16,190,000 represented cigarette and cigar tax collections [11] (Sincock App. 17a-18a; J. S. A. A35-A36). The State Tax Commission Reports demonstrate that in excess of 92% of the total taxes are collected in New Castle County, that 3% are collected in Kent County and 5% are collected in Sussex County. Of the $166,900,000 collected for personal income taxes, approximately 92% were collected in New Castle County, 3% were collected in Kent County and 5% were collected in Sussex County. Of the $23,500,000 collected for inheritance and estate taxes, approximately 94% was collected in New Castle County, 2% was collected in Kent County and 4% was collected in Sussex County. Of the $10,800,000 collected for licenses, approximately 70% was collected in New Castle County, 12% was collected in Kent County and 18% was collected in Sussex County. Of the $16,190,000 collected by the Commission for cigarette and cigar taxes, 73.3% was collected in New Castle County, 12.4% was collected in Kent County and 13.3% was collected in Sussex County (Sincock App. 17a; J. S. A. A35-A36).

Collections made by the State Tax Commission over the same period indicate that exclusive of franchise and corporation taxes, the amounts collected by the Commission average approximately $13,000,000 per representative in New Castle County, less than $1,000,000 for each representative elected in Kent County and approximately

11. For graphic illustration see Sincock App. 81a.

$1,000,000 for each representative elected in Sussex County.[12] In the same period, New Castle County collected $10,500,000 in personal income taxes for each representative, while Kent County collected less than $500,000, and Sussex County collected approximately $800,000 per representative (Sincock App. 18a; J. S. A. A36-A37).

Further results of the Constitutional Amendment are that the combined voting strength of Kent and Sussex Counties in the Senate enables them to override the executive veto and gives to Kent and Sussex Counties with but 31% of the State population the ability to control measures requiring ⅔ vote in the Senate, including revenue measures and appointments by the Governor (Sincock App. 19a; J. S. A. A37).

6. Futile Efforts to Achieve Legislative Reapportionment in the Absence of a Controlling Court Decision.

Neither in the Delaware Constitution nor in the statutes is there any provision for reapportioning the General Assembly (J. S. A. A15). The Delaware Constitution does not provide for either initiative or referendum (Sincock App. 8a). The only procedures contained in the Constitution which would permit a change in the General Assembly is to be found in Article XVI, of the Constitution of 1897. To proceed by amendment, it is necessary that the same be agreed to by ⅔ of all the members elected to both the Senate and the House of Representatives. Thereafter, the Secretary of State is required to publish the proposed amendment three months prior to the next general election, and if the General Assembly next after the said election shall agree to the proposed amendment by ⅔ of all the members elected to each House, the Amendment becomes a part of the Constitution (Constitution, State of Delaware, Art. XVI, § 1). It is also provided that the General Assembly by a ⅔ vote of all its members elected to each House

12. For graphic illustration see: Sincock App. 80a.

may from time to time provide for the submission to the qualified electors of the State at a general election next thereafter the question, "Shall there be a convention to revise the Constitution and amend the same?". If a majority voting on the question decide in favor of the convention, the General Assembly at its next session provides for the election of delegates to the Convention at the next General election. Under the Constitution of 1897, the Convention is to be composed of 41 delegates, one of whom shall be chosen from each representative district, and two shall be chosen from each of the counties. A majority of the Convention constitutes a quorum for the transaction of business. The Convention has the power to appoint its officers and assistants and to determine the rules of its proceedings, and to be the judge of the election, returns, and qualifications of its members (Constitution, State of Delaware, Art. XVI, § 2; J. S. A. A79).

The futility of the efforts to have the legislature reapportion itself in the absence of a controlling court's decision has been clearly demonstrated in the Delaware General Assembly. The reluctance of the down-state majority to adopt any measure relating to reapportionment is a matter of public notoriety and record in this state. Since 1957, at least six bills dealing with reapportionment have died in Committee (Sincock App. 18a-19a).

In 1959, House Bill 164 providing for reapportionment was referred to Committee and died. A similar fate befell House Bill 165 which related to reapportionment of the House of Representatives. In 1961, House Bill 361 seeking to reapportion the House of Representatives was referred to Committee and died. In 1962, Senate Substitute Bill #2 for Senate Bill #3 advocating a reapportionment of the General Assembly was also referred to Committee and died. In 1962, Representative Bartleson introduced a substitute Bill for Senate Bill #3. This also was referred to Committee and expired (Affidavit of Margaret T. Manning, Senator from the 4th Senatorial District).

In addition, two calls for Constitutional Conventions have been rejected. These are identified as House Bill 116 and Senate Bill 365. In 1957, the only reapportionment bill ever to be voted out of committee was defeated by a vote of 4 to 10. Of the votes cast in favor, 3 of the 4 were from rural New Castle County, and 8 of the nay votes were cast by representatives from Kent and Sussex Counties. Aside from the unconstitutional amendment of 1963, following the institution of this action, all efforts to obtain a substantial apportionment of the General Assembly have met with failure. It is significant, we believe, to note the 1963 Amendment provided that representation in a constitutional convention, if the legislature finally did convene one, would be on the basis of representation which now exists in the General Assembly, and which of course dates back to 1897. The reluctance of the minority areas of the State to surrender their stranglehold on the apportionment of the General Assembly is clearly shown by Mr. Wilson's admission that such provisions were written into the Amendment of 1963 in order to make it "exceedingly clear" that there would not be a reapportionment of the delegates to the Constitutional Convention which might consider reapportionment (Sincock App. 73a).

7. The Proceedings Below.

The Plaintiffs-Appellees are residents of four representative districts and four senatorial districts of the State of Delaware and are qualified voters, and tax payers of the State and citizens of the United States. Defendants-Appellants are election officials of the State of Delaware. Plaintiffs, who filed suit June 5, 1963, sought a declaratory judgment that the existing representation as then provided in Article II, Section 2 of the Constitution of the State of Delaware of 1897 violated Section 1 of the Fourteenth Amendment. In addition to seeking declaratory relief, appellees asked for injunctive relief against the conduct of

the 1962 elections to the Delaware General Assembly and thereafter. They also sought a decree of the District Court reapportioning both houses of the Delaware General Assembly in accordance with Article I of Section 3 of the Constitution [13] and submitted a plan in the course of trial which, if decreed by the Court below would grant them and the other citizens of Delaware, similarly situated, the relief sought.

On July 25, 1963, the District Court granted the Defendants a limited stay to permit the legislature, which had been recalled by the Governor, an opportunity of enacting bills recommended by a Bipartisan Committee on Reapportionment (J. S. A. A1). The report recommended (1) a constitutional amendment to Article II, Section 2 allotting senators on a geographical basis and representatives on a predetermined population basis, and (2) the acceleration of the date for a Constitutional Convention. The stay was granted until August 7, 1963. On July 30, 1962 the General Assembly enacted the proposed Amendment to Article II, Section 2 but failed to provide for an accelerated Convention. Thereafter on August 7, 1963, the Court denied Defendants' Motion to Dismiss (J. S. A. A6). On October 8, 1962, the Plaintiffs amended their Complaint asking the Court to declare the proposed Amendment to Article II, Section 2 unconstitutional for the same reasons asserted for the invalidation of Article II, Section 2. On October 16, 1963, the Court denied the Plaintiffs' Motion for a Preliminary Injunction against the conduct of the general election for the General Assembly of November 6, 1963, and also denied Defendants' Motion for Further Stay (J. S. A. A8). The Court next fixed a date and an extensive pre-trial hearing was held. This resulted in a comprehensive order and trial of five days (Sincock App. 2a-29a).

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13. Article I, Section 3 of the Constitution of the State of Delaware of 1897, which is a part of the Bill of Rights, provides:

"Section 3. All elections shall be free and equal."

8. The Decision of the District Court.

On April 17, 1963, the Court filed its opinion (J. S. A. A16-A67). The Court held that Section 2 of Article II as it existed before and after the 1963 Amendment was invalid and unconstitutional. In reaching this conclusion, the Court found that the Plaintiffs have standing to maintain the suit, that the cause of action is cognizable under federal law, and the Court has jurisdiction of the subject matter and the parties; that Section 2 of Article II both before and after amendment creates such an inequality in voting power as results in invidious discrimination, as to bring it within the proscription of the Fourteenth Amendment and this was true as to the apportionment of both the House of Representatives and the Senate of the General Assembly. More specifically, it held that in the apportionment of the House of Representatives the basis must be one of population. One vote, one person must be the aim (J. S. A. A-40-A41), and that population must be given the "heaviest weight" in the apportionment of the Senate. Some weight might be given to other factors such as diverse interests, county governmental functions, geography, area, historic and economic differences, provided, however, that no wide deviation from the principle of population representation will be permitted. The Court rejected the Federal analogy argument, took judicial notice of the diminution of the powers of the counties and concluded that the creation of a Senate on such basis would be unrealistic (J. S. A. A45). The Court also concluded that a further opportunity must be given the General Assembly to reapportion itself in accordance with the guide lines appearing in the opinion. A Stay until October 1, 1963, was entered for such purpose. The opinion, delivered by Judge Biggs, was concurred in by Judge Wright. Judge Layton concurred in the result and adopted the view that the House must be apportioned strictly on a population basis, and he felt it unnecessary to

proceed further because the whole act must fall because of its inseverability. Judge Layton was of the opinion that there is nothing constitutionally wrong if one House is elected upon a strict population basis, to elect members to the Upper House in equal numbers from each county, as a *minimum* standard. He also concluded that no valid reason exists why a county having a very large population should not have more senators than a much smaller county (J. S. A. A65).

The declaratory Decree below was entered on April 30, 1963 (J. S. A. A68).

SUMMARY OF ARGUMENT.

I.

A. The Equal Protection Clause of the Fourteenth Amendment guarantees the Plaintiffs and all others similarly situated against arbitrary and unreasonable discrimination in the apportionment of the General Assembly of the State of Delaware. Arbitrary discrimination among voters with respect to their opportunities for participation in elections and other processes of government violate the Fourteenth Amendment. The explicit holding of this Court in *Baker v. Carr*, 369 U. S. 186 recognizes that these principles are applicable to the apportionment of a state Legislature.

B. The well-developed and traditional tests of the Fourteenth Amendment are available to determine whether invidious discrimination exists in the representation of a citizen of a state in the Legislature of that state. The basic standard of comparison is the representation afforded qualified voters per capita in both Houses of the General Assembly. If the apportionment scheme creates substantial deviations from per capita equality and such deviations result from an apportionment having no rhyme or reason, invidious, arbitrary and capricious discrimination results which violates the Fourteenth Amendment. This Court plainly has the power to determine whether on the facts of each case discrimination exists, and if it does not, whether it reflects no policy, but simply arbitrary and capricious action. *Baker v. Carr*, 369 U. S. 186, 226.

C. Applying the foregoing principles to the facts in the Delaware litigation, shows that invidious discrimination exists in the representation of both Houses of the General Assembly of the State of Delaware; that unconstitutional

discrimination in the rights of suffrage exist as a result of the present composition of the Delaware General Assembly as prescribed by Article II, Section 2 of the Constitution of the State of Delaware of 1897.

New Castle County with 69% of the total population is represented in the House by 15 representatives while Kent and Sussex Counties, with but 14½% and 16½% respectively of the total population, are each represented by 10 representatives. Prior to the Amendment of 1963, 18½% of the total state population could elect a majority in the House. A similar situation exits in the Senate where districts in New Castle County elect 7 senators and districts in Kent and Sussex County elect 5 each. Prior to the Amendment of 1963, 22% of the state's population could elect a majority in that body. Numerous gross disparities exist, not only between classes of political subdivisions, but also within classes. For example, the Sixth Representative District of Brandywine Hundred, with a population of 58,228 inhabitants, has one representative, while the Fifteenth District of New Castle County, having 1,643 inhabitants, has one representative, even though a disparity of 35 to 1 exists between the two districts. Disparities exist throughout the three counties and in the City of Wilmington. For example, the Fourth District of New Castle in Wilmington has but 5,394 inhabitants, while the Fifth District in Wilmington immediately adjacent has 30,000 inhabitants, or a ratio of approximately 6 to 1. In Kent County the Second Representative District has over 17,000 inhabitants and the Sixth District has but 2,600. In Sussex County, the Eighth District has but 2,900 inhabitants while the Tenth District has over 12,000.

In the Senate, prior to the 1963 Amendment, the City of Wilmington, with over 95,000 was alloted two senators; rural New Castle County, with a population of 211,000, was alloted 5 senators, while Kent County with but 65,000 and Sussex County with but 73,000, each were alloted 5 senators. The 17 senatorial districts ranged from 4,177 to

64,820 or approximately 16 to 1. This apportionment permitted 22% of the voters to elect a controlling majority in the Delaware Senate.

The Amendment of 1963 had the effect of subdividing the larger representative districts which had a population in excess of 22,501. It retained all of the remaining smaller districts intact. Disparities in population per representative district in New Castle County remains at over 12 to 1, at over 3 to 1 in Wilmington, at over 7 to 1 in Kent County, and at over 4 to 1 in Sussex County. Furthermore, disparities in almost all cases are therefore found in districts that adjoin one another. The long range effect is to guarantee disparities which will far exceed the Fourteenth Amendment test. It will continue to permit 28% of the population of Delaware to elect a majority in the House. These representatives residing in the 23 smallest districts under the Amendment. In the Senate, less than 22% of the population may elect a majority. The Amendment continues the population disparities that previously existed in New Castle County on a ratio of more than 15 to 1, and increases the population disparities in both Kent and Sussex Counties from 6½ to 1 and 4½ to 1 respectively. The average population per senatorial district will range from 43,921 in New Castle County to 9,378 in Kent or a ratio of more than 4½ to 1 between counties. Kent with 14½% of the state population will elect ⅓ of the Senate, Sussex with 16½% of the state population will elect ⅓ of the Senate, and New Castle County with 69% of the state population will elect one-third of the Senate. Furthermore, under the Amendment, the residents of Kent and Sussex County will each be permitted to elect 2 senators while those in New Castle County can elect but one.

D. & F. In the instant case, the gross inequalities that exist cannot be justified upon the ground that Delaware's policy is to have senators represent counties rather than people, for the Constitution of 1897 allocated representa-

tion in the State's senate on a geographical senatorial district basis rather than on a county basis. Furthermore, the City of Wilmington is given 2 senators and 5 representatives from districts which lie within its boundaries. Moreover, the history of Delaware does not appear to sustain the contentions that the counties of Delaware had, at any time, sovereignty. It reflects to the contrary that from their inception, the 3 counties were owned by William Penn as a proprietor under two deeds of James, Duke of York, and that it was governed by a General Assembly, the seat in Philadelphia, and later in New Castle, where it enacted such laws as were required, subject to the control of the Crown who was represented by a Governor or Lieutenant Governor; that it was bound together by its General Assembly, the Proprietor, and the Crown's representative. Its history further shows that whatever authority the counties may have had prior to 1787, when Delaware was the first state to ratify the Constitution, the powers of the counties have steadily diminished until today they represent an integral part of the State Government, but are subject to the power of the State Legislature upon which they must depend for their authority and continued existence. It would appear therefore that any reliance upon such federal analogy to substantiate the disparities that exist in the General Assembly of Delaware is misplaced.

We believe that this Court's application of the Fourteenth Amendment with respect to legislative apportionment scheme is clearly correct.

E. An examination of contemporaneous congressional legislation discloses nothing about the scope of the Equal Protection Clause of the Fourteenth Amendment in this area because of its inconclusive nature and also because the problem of legislative apportionment was not critical at the time of the ratification of the Fourteenth Amendment, and finally, because the Fourteenth Amendment has been most elastic in conforming to the time its use seems appropriate.

II.

The Court below, having declared the apportionment provisions invalid under the Fourteenth Amendment, was required to afford the Plaintiffs appropriate relief. While the Plaintiffs had asked for the reapportionment by judicial decree, this was denied by the Court which followed the traditional remedy of equity in such cases by entering a permanent injunction which restrained the Defendants from conducting a general election for the election of the General Assembly under the invalid provisions of the Constitution of 1897 and the Amendment of 1963. This was proper, equitable relief, which in no way constituted an abuse of discretion. It was relief which the Plaintiffs were entitled to and was given by the Court in the due course of an orderly procedure totally lacking the pressures, haste, and compulsion imagined by counsel for the Appellants who had not participated in the proceedings prior to this Appeal. Having declared the apportionment provisions of the Constitution to be invalid, the Court further freed the hands of the General Assembly of the State of Delaware to enact apportionment provisions that would fall within the guide lines which it established at the request of counsel for the Defendants and to restore to the Plaintiffs their present rights to representation in accordance with the provisions of the Equal Protection Clause.

Argument.

I.

THE EQUAL PROTECTION CLAUSE IS VIOLATED BY THE GROSS INEQUALITIES IN PER CAPITA REPRESENTATION WITHOUT ANY RATIONAL BASIS WHICH EXISTS UNDER ARTICLE II, SECTION 2 OF THE CONSTITUTION OF THE STATE OF DELAWARE BOTH BEFORE AND AFTER AMENDMENT.

A. The Guarantees of the Fourteenth Amendment Are Applicable to the Apportionment of State Legislatures.

The Fourteenth Amendment protects a voter's right to cast a ballot without unfair impairment or invidious discrimination in the exercise of suffrage. *Gray v. Saunders*, 372 U. S. 368, 375; *Smith v. Allwright*, 321 U. S. 649; *Terry v. Adams*, 345 U. S. 461.

In *Baker v. Carr*, 369 U. S. 186, this Court explicitly announced that the Equal Protection Clause imposes substantive limitation upon the power of a state to dilute the value of franchise of some voters as opposed to others by arbitrary and other discriminations in the apportionment of seats in a state legislature. It decided much more than jurisdictional questions. In the words of one observer: "* * * Only the willfully blind could fail to see an invitation, if not a command, to the reordering of State legislative apportionment laws and practices." McKay, *The Federal Analogy and State Apportionment Standards*, Notre Dame Lawyer, Aug. 1963, P. 487.

Mr. Justice Brennan in a footnote to his opinion referred to "our holding that the Complaint states a federal constitutional claim of violation of the Equal Protection Clause." *Baker v. Carr*, 369 U. S. 186, 195. Justice Douglas, in a separate concurring opinion flatly stated, "If the

allegations in the Complaint can be sustained, the case for relief is established" (Id. 245). Mr. Justice Clark, finding that the Tennessee apportionment was a crazy-quilt without rational basis concluded that, "The Tennessee apportionment statute offends the Equal Protection Clause . . ." (369 U. S. at 258).

Baker stated the rule that gross dilutions of voting rights which result from unlawful geographical discriminations, whether the result of purposeful action or inaction, can lead to limitations that exceed constitutionality. This was the holding of the Court below, which is supported by the overwhelming majority of the state and lower federal courts which have considered the question since *Baker v. Carr*, 369 U. S. 186.[14]

We think it beyond doubt at this point that the guarantees of the Fourteenth Amendment were established in the *Baker* case as being applicable to the apportionment of State legislatures.

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14. See: *Baker v. Carr*, 206 F. Supp. 341 (M. D. Tenn.); *Sims v. Frink*, 208 F. Supp. 431 (M. D. Ala.); *Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo.); *Sobel v. Adams*, 208 F. Supp. 316 (S. D. Fla.); *Thigpen v. Meyers*, 211 F. Supp. 826 (W. D. Wash.); *Toombs v. Fortson*, 205 F. Supp. 248 (N. D. Ga.); *WMCA, Inc. v. Simon*, 208 F. Supp. 368 (S. D. N. Y.); *Moss v. Burkhard*, 207 F. Supp. 885 (W. D. Okla.); *Mann v. Davis*, 213 F. Supp. 577 (E. D. Va.); *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W. D. Wis.); *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb.); *Davis v. Synhorst*, 217 F. Supp. 492 (S. D. Iowa); *Nolan v. Rhodes*, U. S. D. C., S. D. Ohio; *Caesar v. Williams*, 371 P. 2d 241 (Idaho Sup. Ct.); *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656; *Maryland Committee for Fair Representation v. Tawes*, 229 Md. 406, 184 A. 2d 715; *Scholle v. Secretary of State*, 367 Mich. 176, 116 N. W. 2d 350; *Levitt v. Maynard*, 104 N. H. 243, 182 A. 2d 897; *Sweeney v. Notte*, 183 A. 2d 296 (R. I. Sup. Ct.); *Harris v. Shanahan*, Dist. Ct., Shawnee Cty., Kan.; *Fortner v. Barnett*, No. 59,965, Chancery Ct. First Judicial Dist. of Hinds Cty., Miss.; *Fishman v. White*, Superior Ct., Suffolk Cty., Mass.; *Jackman v. Bodine*, 78 N. J. Super. 414, 188 A. 2d 642; *Asbury Park Press, Inc. v. Woolley*, 33 N. J. 1, 161 A. 2d 705, 710.

B. The Well-Developed and Traditional Tests of the Fourteenth Amendment Are Available to Determine Whether Invidious Discrimination Exists.

In *Baker v. Carr*, 369 U. S. 186, the Court, through Mr. Justice Brennan said:

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." (Id. 226)

Mr. Justice Douglas in a concurring opinion stated:

> "The traditional tests under the Equal Protection Clause has been whether a State has made 'an invidious discrimination.' . . ." (Id. 244)

The invalidating opinion of the Court below was premised on traditional Fourteenth Amendment concepts, which when applied to Article II, Section 2 of the Constitution of Delaware as it existed prior to and after amendment, evidenced an inequality in voting power which resulted in invidious discrimination and brought such provisions within the proscription of the Fourteenth Amendment. The Court found this to be true as to the apportionment in both Houses of the General Assembly of Delaware (J. S. A. A40). It further concluded that, while mathematical exactitude in apportionment may not be possible in an absolute sense, the disparities created by the Delaware apportionment provisions are of such a startling nature as to demonstrate a debasement of franchise of electors of this State which the equal protection clause cannot tolerate (J. S. A. A41).

In arriving at these conclusions, the Court followed the standard of comparison of per capita equality of representation or the principle of equality and majority rule, i.e., "the concept of political equality from the Declaration of Independence, of Lincoln's Gettysburg Address, to the

Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing, one person, one vote." *Gray v. Saunders*, 372 U. S. 368, 381.

The decision below is a reaffirmation of the degree to which equality and equal treatment in participating in a representative form of government is a fundamental principle of the political philosophy embodied in American institutions and safeguarded by the Fourteenth Amendment. It concluded that the House of Representatives must be apportioned on a population basis with reasonable exactitude and that while other factors such as history, economical conditions, diverse interest, county government functions, geography, and other considerations designated as "area" factors may be considered in the apportionment of the Senate, the aim there, as in the apportionment of the House of Representatives on a state-wide basis, must be one vote, one person (J. S. A. A42-A43).

In formulating the above holding, the Court followed the usual standards for judging the constitutionality of legislative classifications to determine whether the differentiation which it found to exist was arbitrary and unreasonable. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79; *McGowan v. Maryland*, 366 U. S. 420, 425-426; *Phillips Chemical Co. v. Dumas School District*, 361 U. S. 376, 385; *Morey v. Doud*, 354 U. S. 457, 463-464.

In order to justify a deviation from equality between persons or group of persons, some rational legislative policy must be served by such discrimination. *Goesaert v. Cleary*, 335 U. S. 464. The Court below, after a full trial on the merits, found no rational reason which would support the existing and great disparities in per capita representation and indeed no such offer of proof was made by the Defendants. The burden is on the Defendants to adduce and prove such a rational reason for the proven disparities in per capita representation. *Skinner v. Oklahoma*, 316 U. S. 535, and having so failed to offer any rational justi-

fication, the invalidity of the Constitutional provisions and the Amendment remains apparent and compels the affirmance of the decision below.

C. Invidious Discrimination Exists in Representation of Both Houses of the General Assembly of the State of Delaware.

The composition of the House and Senate of the Delaware General Assembly is established by the provisions of Section 2, Article II of the Constitution of the State of Delaware of 1897. This section, as it existed prior to the 1963 amendment, divided Delaware into 35 geographical districts, and provided that the qualified electors of each district should elect one representative to the House of Representatives. It also divided Delaware into 17 geographical senatorial districts, from each of which a senator was elected by the qualified electors. The section created 15 representative districts, numbered 1 to 15 inclusive, in New Castle County; 10 representative districts, numbered 1 to 10 inclusive, in Kent County, and 10 representative districts, numbered 1 to 10 inclusive, in Sussex County. It also established 7 senatorial districts, numbered 1 to 7, in New Castle County, 5 senatorial districts, numbered 1 to 5, in Kent County, and 5 senatorial districts, numbered 1 to 5, in Sussex County.

At the time of the adoption of the Constitution of 1897, the population of Delaware was 180,000. About 105,000 resided in New Castle County, 70,000 of whom resided in Wilmington, and 35,000 resided in rural New Castle County. 32,000 inhabitants resided in Kent County, and 38,000 persons resided in Sussex County.

The Constitution of 1897 contained no provisions for initiative or referendum. It contained no provisions for a periodic review of apportionment and in point of fact, no modifications of the provisions of Article 2, Section 2 of the Constitution of 1897 were made at the time that this suit was instituted.

In 1960, the total population of Delaware amounted to 440,292 inhabitants, of which 307,446 persons resided in New Castle County. Of these 95,827 resided in Wilmington, and 211,619 resided in rural New Castle County. In the same year 65,651 resided in Kent County and 73,195 resided in Sussex County.

By 1960, as a result of the change in population, the representative districts ranged in size from 1,643 inhabitants of New Castle County's 15th representative district, Blackbird Hundred, to 58,228 inhabitants of the 6th representative district of Brandywine Hundred.

At the 1962 General Election, a vote in the 15th representative district was equal to one vote in the 6th representative district, although the population of the latter was 35 times greater than the former. In the 1962 General Election, 18 representative districts with the least population, and containing approximately 18½% of the state's population, was able to elect a majority of the House of Representatives. The inhabitants of the 18 least populated representative districts are less in number than those of but 2 districts having the heaviest concentration of population, although the former elect 18 representatives in the House of Representatives, and the latter elect but 2 representatives in the House of Representatives.

The 1960 decenial census showed that more than ½ of the entire population of Delaware, 233,718 persons, lived in 6 representative districts, whose representatives in the General Assembly have the same voting power as the representatives of 16,552 persons residing in the 6 least populous districts.

A similar situation existed prior to the 1963 amendment with regard to the senatorial districts established by the Constitution of 1897. The 7 senators were apportioned to New Castle County which had a population of 307,446, as compared with the 5 senators in Kent County, which had a population of 65,651 and the 5 senators in Sussex County, with a population of but 73,195. Of the

7 senators from New Castle County, 5 represented the rural area having a population of 211,619. The City of Wilmington, with a population of 95,827, was allotted 2 senators.

The population of the 17 senatorial districts as they existed prior to the 1963 amendment range from 4,177 to 64,820 or approximately 16 to 1. The apportionment permitted 22% of the voters to elect a controlling majority in the Delaware senate.

Thus, throughout Delaware, through the process of silent gerrymandering, invidious discrimination can be found in both the representative and senatorial districts on both an inter and intra county basis. Differences are also manifest in the City of Wilmington where the 4th representative district, for example, with 5,394 inhabitants, has the same representation in the Delaware House of Representatives as the 2nd District with 33,772 inhabitants, and the 5th Districts with 30,448 inhabitants.

This crazy quilt pattern of apportionment in Delaware is the product of a population explosion in some areas, and complete stagnation in others. The gross inequalities in per capita representation which have arisen in the 66 years since it was promulgated clearly exceed the permissible deviations inherent in the standard Fourteenth Amendment test, and constitute an unreasonable dilution of the voting rights of the citizens of the State of Delaware, and are unconstitutional. The existing disparities are of such sufficient magnitude to rebut even the strongest presumption of constitutionality and to establish the debasement of voting rights which the Fourteenth Amendment forbids. *Lisco v. McNichols*, 208 F. Supp. 471, 478 (D. Colo., 1962).

The amendment of Article II, Section 2 (J. S. A. A77) had the effect of adding ten additional seats in New Castle County by subdividing the districts that had a population in excess of 22,501. It retained all of the remaining geographical districts intact. The effect on the election

of representatives of the House from Kent and Sussex Counties is nil. Giving effect to the amendment, we find that disparities in population per representative district remain in New Castle County at over 12 to 1; at over 3 to 1 in Wilmington; at over 7 to 1 in Kent County; and over 4 to 1 in Sussex County. Furthermore, disparities in almost all cases are to be found in districts that adjoin one another. The long range effect of the Amendment is to guarantee disparities in the population of representative districts, which will far exceed the Fourteenth Amendment tests. Under it, the number of representatives from New Castle County will be approximately 55%, although that County has a total population of 69%. It will, however, continue to permit but 28% of the population of Delaware to elect a majority in the House of Representatives with the 28% residing in the 23 smallest districts under the amendment.

With regard to the Senate, the Amendment will continue population disparities in New Castle County, ranging from 4,177 to 64,820 or a ratio of more than 15 to 1. In Kent County, the population disparities between districts will range from 7,000 to 46,000 or a ratio of approximately 6½ to 1, and in Sussex County, the population disparities will range from 9,500 to 39,000, or a ratio of more than 4½ to 1.

The average population per senatorial district in the three counties will range from 43,921 in New Castle County for each senator elected, to 9,378 in Kent County, or a ratio of more than 4½ to 1 between counties. Under the Amendment, Kent County with but 14½% of the population of the State will elect ⅓ of the Senate; Sussex with but 16½% of the population of the State will elect ⅓ of the Senate; and New Castle County with 69% of the total population of the State will elect but ⅓ of the Senate.

The Amendment by adding two at-large senatorial districts in Kent and Sussex Counties, superimposed on existing districts, permits each Kent and Sussex County voter

to elect 2 senators to represent them in the General Assembly while a voter residing in New Castle County is permitted to elect but one.

Thus, in Delaware where neither initiative nor referendum exists, where no provision is made for periodic reapportionment, and where amendment, either by action of the legislature or by convention, is controlled by the minority in both Houses, and where neither House of the General Assembly is apportioned in accordance with population or per capita representation, disparities of representation exist which do result in the invidious discrimination shown above.

D. The Defendants Can Offer No Rhyme or Reason for the Gross Inequalities in the Representation That Exist Under the Apportionment Plan of the Constitution of 1897 and the Amendment Thereto, and Reliance Upon the So-Called Federal Analogy Is Misplaced.

1. The History of Delaware Is Irrelevant to the Questions Before This Court and Has No Application to the Present Question of Whether the Apportionment of the General Assembly of the State of Delaware Meets the Developed Standards of the Equal Protection Clause.

The Defenses raised are basically three in nature. One is that there is no invidious discrimination. This we have discussed at another point in this brief (pp. 33-37). The second defense asserted is that the apportionment provisions are rational because of a supposed analogy to the federal system by reason of a peculiar historical development of the counties in Delaware. The third defense is that the Fourteenth Amendment was not intended to apply to the apportionment of state legislatures. In reaching this defense, the Defendants seek to invoke the aid of contemporaneous congressional interpretation.

The historical material contained in the Appellants' brief is interesting, but its significance is highly exag-

gerated. For the most part, it is irrelevant to the issue of upholding the decision of the District Court. The issue before the Court below, and indeed before this Court, is whether the Delaware legislature as apportioned by the 1897 Constitution and as apportioned by the 1963 Amendment is constitutional under the developed standards of the Equal Protection Clause. We have shown in the Statement of the Case that disparities of representation resulting in invidious discrimination against the Plaintiffs and others similarly situated, are clearly established by the crazy-quilt pattern of apportionment contained in the Constitution and the Amendment. The Court below held in an opinion reached after an exhaustive trial of the facts, which are almost ignored in the Appellants' brief, that Article II, Section 2 and the Amendment both violated the Fourteenth Amendment of the Constitution of the United States.

As alleged justification, the Appellants here seized upon a quotation from the publication, *One Man, One Vote, A Statement of Basic Principles of Legislative Apportionment*, Twentieth Century Fund, 1962 (App. B, 33) to argue that the federal analogy of area of representation in the Senate of the United States is applicable in Delaware because of the supposed creation of state by three existing sovereign counties in 1776.

We think it not inappropriate to point out that whatever the legal status of the counties might have been in 1776, this case is concerned with the State of Delaware and the acts of legislature of the State of Delaware in denying equal protection of the law to citizens of the State of Delaware. The issue is not an abstract one over "county sovereignty" that may or may not have existed in the eighteenth century, but the rights of individuals presently existing in the twentieth century.

Moreover, if the county history of Delaware is of any moment to this Court, we believe that its history is such as to deny the theory of county sovereignty.

The counties of today are an integral part of the state. They have, however, no attributes of sovereignty at the present time, if ever they did. Originally the area of the state was divided into but two counties; New Castle in the north settled by the Swedes and English and Whorkill in the southern or lower portion of the state settled by the Dutch. In 1680 the third county was created by dividing Whorkill and by creating St. Jones County. 2 Scharf, *History of Delaware*, p. 1028. In 1682 after Penn had acquired a proprietory right to the area the names of the counties were changed to Kent and Sussex.

The governmental organization of the counties may be traced to Captain William Markham, the cousin of William Penn, the proprietor, who was commissioned on August 10, 1681 to establish a council of nine members in New Castle to set boundaries, to establish the courts and to organize a government under the proprietor. Manlove Hayes, *William Penn and His Province*, Historical Society of Delaware 1898, p. 22.

Under William Penn the three counties then known as the territories were united with the Province of Pennsylvania by virtue of the Act of Union of December 10, 1682 in order that residents of the three lower counties may live "under the same law and government that the inhabitants of the providence of Pennsylvania should enjoy." Vol. I, *Delaware Register, Annals of Delaware*, p. 290. Delaware was thus united with the providence of Pennsylvania in the person of the proprietor, the royal Governor and a common legislative body. This union proved to be tempestuous and temporary, and as a result of numerous sectional quarrels and debates, Penn was temporarily deprived of his control and a royal colony was established. Penn was reinstated as proprietory and in November of 1704 the counties of New Castle county and Sussex separated from the province of Pennsylvania and formed their own government under the proprietor and a lieutenant governor representing the crown, adopting the style and name of "The Government of the Counties of New Castle, Kent, and Sussex upon Delaware."

In 1705, a State House was erected in New Castle, and it became the seat of The Government of the Counties of New Castle, Kent, and Sussex upon Delaware and continued as such through the American Revolution. The colonial assembly which met at New Castle consisted of representatives from each of the three counties. They met spasmodically, and enacted such laws under the proprietor and lieutenant governor as appeared to be required for their common welfare. The history of our state appears to be uneventful insofar as county and state government was concerned until the year 1776 when, The Government of the Counties of New Castle, Kent and Sussex upon Delaware, acting by and through its representatives in New Castle, sent delegates to the Continental Congress in Philadelphia. Following the recommendations of that Congress that, in anticipation of independence from the crown, each colony designate a form of government which would be free and independent from the governor and royal crown in the event of independence, The Government of the Counties of New Castle, Kent and Sussex upon Delaware adopted appropriate resolutions on June 15, 1776, which perpetuated in authority those persons then holding office in the colony to continue to exercise such powers as they then held until a new government could be formed, agreeable to the Continental Congress. Force, *American Archives*, 4th series Vol. 6, P. 884.

Following the Declaration of Independence on July 4, the representatives of The Government of The Counties of New Castle, Kent and Sussex upon Delaware, convened in New Castle and on September 20, 1776 formally adopted the first constitution of the State of Delaware.

Thus Delaware history teaches us that from its early beginnings of colonization and through the period of William Penn from 1680 to 1776 the three counties were united in a government that must be considered until independence as having been, with a brief interlude as a royal colony, a proprietory government of William Penn and his heirs.

Throughout its history, the counties, two of which were divided, by Penn served a governmental function but had no autonomous sovereignty as such. Each was equally represented in the General Assembly during the Act of Union and thereafter, and indeed there was good reason for equal representation. The population of Delaware in its early history was sparse and equally distributed in the three counties. On the eve of the revolution, the total population was approximately 37,000 and was fairly evenly divided among the three counties. Monroe, J. A., *Federalist Delaware, 1775-1815*, p. 15. Thus, under the Constitution of 1776 when a bicameral legislature was created called the General Assembly, each of the counties was equally represented in the upper house known as the Legislative Council, and the lower house known as the House of Assembly. From 1776 until February of 1779, Delaware was constitutionally an independent nation allied in war with Great Britain with 12 former colonies and, while the plan of union for the 13 colonies had been completed and submitted to the 13 states in the latter part of 1777, it was not until February of 1779 that Delaware ratified the union.

Its history does not reveal any specific instances in which the claim was made by the counties that they were sovereign. The three learned judges below, each steeped in Delaware history, found no county sovereignty existed. No authority of the Defendant's claims that true county sovereignty existed.[15] Through the subsequent constitu-

15. The witness, Leon DeValinger, equated county sovereignty with the fact that each county was represented in the Assembly at New Castle:

BY MR. HUGHES:

Q. Mr. DeValinger, what I meant to get at is you would not say that they were sovereign before the Declaration of Independence?

A. Well, when I said that they were I was thinking in terms that they were able to legislate in their own behalf, in their own Assembly at New Castle. I was thinking in that term. (Del. App. 21a)

tions of 1792 and 1831, representation in the legislature of the State remained equal. In 1852, however, when the first population shift in the State appeared, a Constitutional Convention was held which provided additional representation on population for the City of Wilmington. Because such representation was not adequate, a representative of the Wilmington area bolted the convention and later was successful in defeating the draft of the constitution which was presented to the people for approval. See: *Debates and Proceedings of the Constitutional Convention of the State of Delaware*, Dover, p. 1853. By 1897 it was no longer possible to continue a General Assembly that was wholly predicated upon factors other than population and in that year the present area representation in both the house of Representatives and the Senate was created. It is interesting to note that Delaware history repudiates the claim that Federal analogy is applicable to it as early as 1852. History shows that when population growth occurred in Delaware, there was a corresponding increase in the desire for representation in the General Assembly based upon population. Between 1852 and 1897 as the population increased, the pressures for increased representation on a per capita basis grew stronger and, finally in 1897, when the present constitution was adopted, the county sovereignty principle broke down completely and the convention adopted representation based upon geographical districts that had no relationship to counties, whose delegates in the General Assembly were selected from each district and not from the counties at large as had been done theretofore in Delaware.

The debates of the Convention of 1897 are voluminous and are bound in five volumes containing 3,513 pages of debates and reports. These debates constitute Delaware History and served as the basis for the historic facts contained in the Complaint and in the trial of this cause. The lessons of history which they teach is, that by 1897 whatever the prior history may have been, county sovereignty as such had ended in that convention.

Today, the counties exercise a number of governmental functions and rights that have been referred to in the opinion of the Court below (J. S. A. A39). It is illuminating we think to note that each of the powers exercised by the counties in Delaware today are powers that have been specifically granted to them by the Delaware State Legislature. The legislature or state having the power to give, of course, has the power to withdraw and thus, to speak of county sovereignty as a justification in 1963 for the gross inequality in representation which exists in the Delaware Legislature is to lean indeed on a most slim reed.

2. Reliance Upon the Supposed Analogy Between the Legislative Body of a State and the Congress of the United States Is Misplaced.

The historical concern which necessitated the compromise which resulted in Article 1 of the Federal Constitution does not provide a rational basis for the grossly disproportionate representation which exists in the Delaware General Assembly. Delaware is not a federated republic; it is a unitary state. Its counties take their power, duties, and indeed, their very existence by grant of the state. It is significant to note that the duties and powers ascribed to in the pre-trial order (Sincock App. P. 32a) are all the result of legislative grant by the General Assembly of the State.

In this regard, Delaware merely illustrates the universal rule concerning the limited authority possessed by the political sub-divisions and their dependence on the state legislature for power and their exercise of governmental powers. *Hunter v. City of Pittsburgh*, 207 U. S. 161.

Moreover, Delaware's bi-cameral legislature and its counties bear no counterparts historically, legally, politically, or philosophically in the federalist system of sovereign states.

The Fourteenth Amendment guarantees the equal protection of law to all persons. Article 1 of the Constitution

guarantees the exact opposite with regard to the apportionment of the United States Senate.[16] In examining the so-called federal analogy one must remember that the apportionment provided in Article 1 of the Federal Constitution can not in any way be limited by the application of the Fourteenth Amendment. The Fourteenth Amendment, however, permits, and indeed, sustains a challenge to the federal plan of apportionment where its apportionment would sanction as it would in Delaware discrimination based on no other policy.

It is respectfully suggested that the so-called analogy sought to be drawn from the composition of the General Assembly of the State of Delaware, to the composition of the United States Senate, is inapposite. For as this Court stated in *Gray v. Sanders*, 372 U. S. 369:

> "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution as the result of specific historical concerns, see footnote 8, *supra*, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a state in a state wide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued."

There is nowhere to be found in the history of the state of Delaware any proceeding wherein the composition

16. See *Scholle v. Hare*, 360 Mich. 123; 104 N. W. 2d 63, reversed and remanded, 329 U. S. 429; "Article 1 * * * [of the federal constitution] guarantees *inequality* of the representative value of a man's vote so far as concerns a National senate, whereas the Fourteenth Amendment guarantees a *substantial approximation* of the *very opposite* within the frame work of the government of each state."

of the General Assembly of the state of Delaware was ever subjected to the necessities underlying the composition of the United States Congress. The principle of equal representation of the state combined with the populative representation of the House of Representatives was part of a historical compromise between sovereign states agreeing to form a federal union. It was not a compromise of what constitutes a fair apportionment. Such compromises frequently occur and the manner in which an apportionment is decided is largely irrelevant in determining whether or not it is arbitrary and therefore violates the Fourteenth Amendment. The compromise in the constitutional convention was over the nature of the new union. Those who favored a legislature made up of one house with each state represented equally—the same apportionment as in the Congress of the Confederation—uniformly believed that the new government should merely be a reconstruction of the old Confederation, although with additional power to meet the problems the Confederation had been unable to solve.

Thus, they saw the new government as a composition of sovereign states with powers in areas in which the individual states had been ineffective. On the other hand, the advocates of a legislative, whether made up of one or two houses apportioned entirely according to population invariably considered the proposed constitution as establishing an entire new government operating directly on the people with the states in a decidedly subordinate role. Ultimately, because the lack of agreement on the basic nature of government and the apportionment which depended on this question, threatened to prevent the adoption of a new constitution, the delegates compromised. They decided to establish a government which operated directly on the people but was composed of sovereign states. The House of Representatives was considered as representing the people, while the Senate represnted the states.

That the Federal analogy to the Delaware scheme of government is a false one is shown by the following additional facts:

1. The United States Congress is composed of two Houses, the Senate and the House of Representatives, the House of Representatives being apportioned according to the population. The guarantee of one representative to each state works out quite differently from the apportionment in the Delaware House of Representatives according to the amendment to Article II, Section 2 of the Constitution of 1897. The reasons being basically that there are not enough representative districts to allow true distribution in accordance with population, whereas, there is such a sufficient number of seats in the Congress. Of the 436 incumbents of the House, only 5 come from states which have less than 1/436 of the population.[17] In the Congress it takes representatives from states with almost 50% of the population to constitute a majority of the House of Representatives, but only 28% (prior to the amendment, but 18.5%) of the people elect a majority to the Delaware House of Representatives.

Additionally, apportionment to the Delaware House of Representatives and Senate is to districts, rather than to the county, whereas in the federal system apportionment is to the state as a whole when there is not sufficient population to justify a representative district on a population basis. The obvious conclusion from the above is that in Delaware neither of the two Houses is apportioned in whole or in principal part upon population.

17. Vermont, Wyoming, Nevada, Alaska, and Delaware.

E. In Delineating the Application of the Equal Protection Clause of the Fourteenth Amendment, Nothing Is to Be Gained by Turning the Clock Back to 1868 When the Amendment Was Adopted, But the Right to Equal Suffrage Must Be Considered in the Light of Its Full Development and Its Present Place in American Life Throughout the Nation.

The contention is made that contemporaneous congressional legislation purporting to "readmit" the former Confederate states establishes that state constitutions providing for senates apportioned on an area basis were never deemed to violate the Equal Protection Clause.

This contention finds its genesis in *Brown v. Board of Education*, 347 U. S. 483. There, this Court held that such a discussion relative to the application of the Fourteenth Amendment to segregated schools was at best inconclusive.[18] Mr. Chief Justice Warren speaking for the court said (489-490):

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18. As this Court has already noted in *United States v. States of Louisiana, etc.*, 363 U. S. 1, the extent of the examination of the various constitutions of the former confederate states by the reconstruction congress is uncertain. The strong possibility is that it is limited to the determination of whether or not the candidate state possessed a republican form of government and whether or not the constitution had been duly adopted. In that case, Mr. Justice Harlan stated:

> "Reliance is based on the act of March 21, 1867, 14 Stat. 428, providing for a state's readmission when, among other things, its 'constitution' shall have been admitted to congress for examination and approval and congress shall have approved the same * * *"
>
> "I find nothing in this provision or in those of any of the other so-called reconstruction legislatures act of March 23, 1867, 15 Stat. 2; Act of July 19, 1867, 15 Stat. 14; Act of March 11, 1868, 15 Stat. 41, which warrants the conclusion that the constitution of the readmitted states were to be 'approved' by congress except in the sense that congress must be satisfied that they had been duly adopted and were republican in form.
>
> "The following excerpts from the congressional debates are typical of many others: 'Now, sir, what is the particular question

"Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convinces us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinction among 'all persons born or naturalized in the United States', their opponents just as certainly, were antagonistic to both the letter and the spirit of the

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we are concerned? Five or six states have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the government of the United States. They have sent those constitutions here * * * We have looked at them; we have pronounced them republic in form; and all we propose to inquire is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the union'. Representative Stevens of Pennsylvania, Cong. Globe, 40th Cong. 2d Sess. 2465.

"'All previous fundamental conditions imposed upon a state being admitted into the union have been upon one of two grounds, either that the clause in the State constitution objected to was not violative of the constitution of the United States, or that it effected some great material rights without which the government would not be republic in form * * *.

"'When we go beyond securing the enforcement of the guarantee of republic government, which we have the power to do, when we undertake to legislate for them upon matters on which they have passed, we transcend our boundaries'. Senator Sherman, Cong. Globe, 40th Cong. 2d Sess. 2968, 2969." (P. 136 et seq.)

That the questions raised in the instant and related actions do not involve the concept of republican form of government (Article IV, Section 4, Constitution of the United States) has been held by this court in *Baker v. Carr*, 369 U. S. 186.

Amendments and wished them to have the most limited effect. What others in Congress and the State legislatures had in mind cannot be determined with any degree of certainty.

"An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement towards free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas. The school term was but three months a year in many states; and compulsory school attendance was virtually unknown. *As a consequence, it is not surprising that there should be little in the history of the Fourteenth Amendment relating of its intended effect on public education.*" (Emphasis added.)

The Court went on in *Brown, supra,* to state (p. 492):

"In approaching this problem we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its

full development and present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these Plaintiffs the equal protection of the laws."

Contrary to the claim of "firstness" asserted by counsel for the defendants (App. B. 71), the specific rationale, that the approval of the constitutions of the former Confederate States by the Reconstruction Congress indicated something about the applicability of the Fourteenth Amendment, was also suggested by Mr. Justice Frankfurter in his dissenting opinion in *Baker v. Carr*, 369 U. S. 186, 310. An element of the same contention also appears in *Maryland Committee for Fair Representation et al. v. Tawes*, 229 Md. 406, 184 A. 2d 714 (719).

Where a literal interpretation of a clause of the constitution cannot suffice (as normally it cannot), the courts usually turn to the constitutional convention debates, the comments of Jefferson, Madison's notes and the writings of other contemporaries, or the legislative history of an amendment. In some cases, where the official record is silent, a *post hoc* contemporaneous construction may develop. Perhaps the best illustration of such an interpretation is *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394 in which the Court accepted the so-called conspiracy theory of the Fourteenth Amendment and held that corporations were "persons" under the amendment. The legislative history of the amendment provides no such interpretation. See: James, *Framing of the Fourteenth Amendment* (1956 University of Illinois).

At its best, contemporaneous construction is a difficult process. Witness for example that a Congress contemporary to the period in which the Fourteenth Amendment was adopted enacted the Civil Rights Acts which a similarly contemporary court held unconstitutional. *The Civil Rights Cases*, 109 U. S. 3.

Furthermore, of all the parts of the constitution, with the possible exception of the commerce clause, the several clauses of the Fourteenth Amendment have been most elastic in conforming their interpretation to the time in which their use seems appropriate. Surely the concepts of due process and equal protection have changed since the *Slaughter House Cases*, 16 Wall. 36 (83 U. S. 394), decided on April 14, 1873, less than 5 years after the Fourteenth Amendment was adopted or *Plessy v. Ferguson*, 163 U. S. 537 decided in 1896.

Brown v. Board of Education, supra, is perhaps the best illustration of the hazards and general disutility of contemporaneous construction. There, as has been pointed out, the Court specifically directed additional argument on the historical meaning and development of the equal protection clause in the area of education. Evidence was submitted which purported to prove that Congress "could not have meant" the clause to require desegregation, since a contemporary Congress established a segregated school system for the District of Columbia, and because some of the ratifying states had segregated school systems. Virginia's school system, established by the reconstruction constitution provided a segregated school system, yet Congress not only accepted it, but demanded that it not be changed. Surely Appellants do not suggest that this contemporaneous construction of the Fourteenth Amendment may now be used to overrule the *Brown* decision. Nothing could better summarize the constitutional significance of the developing concept of equal protection of the laws than the Chief Justice's rejection of the argument built on contemporaneous construction. The Court there refused, as noted above, to turn the clock back to 1868 when the amendment was adopted.

Contemporaneous construction may be significant, but it is not controlling in a system which permits the law to grow with the times. As conditions change, as society matures, the law has also changed and matured.

Such evidence as does exist would strongly suggest that the purpose of the Fourteenth Amendment was basically to protect the rights of negroes. Thus, the Reconstruction Congress refused to "accept" the new constitutions of the confederate states until they ratified the amendment. The history and contemporary meaning of the amendment must be understood in that light. There was some substantial doubt about the legality of the "readmission" process itself. This doubt would seem well placed in light of *Texas v. White*, 7 Wall. 700, 19 L. ed. 227, which held that secession was a legal impossibility in the federal union. Ratification of the amendment, with its overriding concern for negro rights, was the overwhelming concern of the Reconstruction Congress. Ratification was politically possible only by predicating acceptance of southern congressional representation on southern ratification. Similarly, for reluctant southern leadership, ratification was the only road to the end of the hated reconstruction regime's grip on southern government. Coulter, *The South During Reconstruction*, 1867-77, Vol. VIII, in *A History of the South*, La. State U. Press, 1947, pp. 137-138.

Two assumptions can be made. One is that under the standards of equality of the time, given the specific circumstances of South Carolina, Georgia, and the other states with disparities of 6-1 mentioned by Appellants, Congress considered these extreme cases explicable, in that (a) majority rule was assured and (b) the spread of representatives was not otherwise invidiously discriminatory. More likely, however, they considered the apportionments, *if at all*, adequate or not as important under the disruptive conditions of the reconstruction, as the provisions for civil rights and suffrage and the practical necessity of getting the Fourteenth Amendment adopted, inasmuch as it was in severe difficulty, and likely of failure unless the Southern states were coerced to ratify it. Random disparities of 6-1 within 100 years of the establishment of the free government may well have seemed as fair there and then as

separate facilities and schools for the negro race. Separate facilities were an advance over no facilities. And without question, the constitutions of the period before and after the Civil War were advances in democracy over their antecedents. We deal in this case with a regression in equality, not an advance.

The reconstruction constitutions were uniformly more democratic than those they replaced. They extended suffrage to negroes and abandoned both race and property as bases of representation, replacing these restrictive provisions with the total population as the representative base. *Ibid.*, p. 135; Simpkins and Woody, *South Carolina During Reconstruction.* University of North Carolina Press, 1932, pp. 95-98. In this sense, the contemporary purpose of the amendment was fulfilled. At that time, the problem was not the apportionment formulae failing to conform with then existing notions of fairness or equity, but exclusion of negroes or the propertyless from the base on which representation was computed. It should also be remembered that during this period new state constitutions provided increasingly for a population basis for representation and universal manhood suffrage. For instance, the 1864 Constitution of Maryland provided a true population base for one house, and for the first time took some account of Baltimore's population. Of this period it has been written that if the post civil war period in American History can be called the Age of Insurgency, it may also be called the Age of Reaction of Direct Representation. DeGrazie, *Public and Republic*, 1951, p. 160.

In addition, the question of apportionment *as such* had not reached the proportions of a national problem by this time. In most states reasonable equality existed, and moreover, social differentiation had not reached the point accompanied by population concentration to make the problem acute beyond some of the oldest states.

Of the Southern states, only Georgia and South Carolina did not use population alone or substantially for the

basis of one legislative house. In *Toombs v. Fortson*, 205 F. Supp. 248 (D. C. Ga., 1962), a federal court, in reviewing the history of Georgia's apportionment, found the post bellum apportionment probably not unreasonable for the then existing population pattern. Speaking of the 1868 apportionment, the court said (255):

> ". . . when it made its appearance this formula was to some degree adjusted to population. History also demonstrates that tremendous shifts in population, have destroyed the 3-2-1 system as a population apportionment basis. The result is that what may have been a reasonable apportionment by population when the system was introduced, has through inaction, become an unreasonable system as relates to population."

Similarly, Senate apportionment in Georgia made, at the least a limited recognition of the most populous counties claim for more representation.

This leaves only South Carolina as the possible basis of the claim that the Congress and the ratifying states "couldn't have meant" the equal protection clause to apply to legislatures. It already has been established that the 1868 South Carolina constitution provided a more representative legislature than that which preceded it. There would seem, in light of the political history of the amendment and the overwhelming tendency to make legislatures more democratic during this period, just as much evidence that the framers and ratifiers "couldn't have meant to exclude" legislatures from application of the amendment "as that they couldn't have meant to include them." By the line of reasoning followed by Appellants, the rejection of the Amendment by malapportioned Delaware and Maryland, "could well have meant" they feared the consequences of equal protection for their legislatures. New Jersey and Ohio also attempted to withdraw their consent to the Amendment. Both states now have "federal plan"

apportionments. We suspect their actions are equally significant to those reported in Appellants' brief.

The enforcement section itself would lend more credence to this notion than to the necessity of exclusion. The penalty of reduction of seats in Congress was to result if a state discriminated against voters in the election of members of Congress, state officers and legislatures.[19]

The argument, to be frank, is pure conjecture. It is less good as conjecture, even, than the contemporaneous construction argument of *Brown v. Board of Education, supra*. There, at least, there was subsequent Congressional action on segregated schools. In a sense, the same thing is suggested here.

It is argued that by accepting the reconstruction constitutions, and in admitting to the union other states since 1868, the Congress established as policy, at the least, or an overt interpretation of the Fourteenth Amendment at the most, that the constitutions of the newly admitted states conformed to the provisions of the Fourteenth Amendment's Equal Protection Clause. Let us consider the proposition in decreasing levels of generality.

First, the basic duty of Congress in admitting a new state is to certify that it has a republican form of government. There is no precise legal or political definition of this term. Acceptance by Congress of a State Constitution is not a guarantee that every clause of the state's basic law conforms with the Supreme Law, the United States Constitution. If Congress had this power, it could, by chicanery, subvert the Constitution itself by accepting any error or idiocy which a state convention might adopt. Congress may require a constitution contain certain things, but it cannot guarantee the state safe passage through a challenge of its constitution against the Federal charter. The

19. Enforcement of the section has never been attempted, and has been held to constitute a political question. *Saunders v. Wilkins*, 152 F. 2d 235 (CCA 4, 1945); cert. den. 328 U. S. 870, reh. den. 329 U. S. 825, 329 U. S. 825 (1946). This is probably undisturbed by *Baker v. Carr*.

cases before the court, as Mr. Justice Brennan clearly said in *Baker*, arise under the Equal Protection Clause, not under the Guaranty clause.

Since 1868, states were admitted which maintained segregated school systems. Closer to the point here, Constitutions containing the grandfather clause for suffrage qualifications were approved. Congressional acceptance of the original constitution did not save it from later challenge under the Fourteenth Amendment or other provisions of state constitutions.

Next, if one turns to the "readmitted" states of the Confederacy, an even less substantial case appears. The argument is advanced that these states would not have been readmitted with legislatures which violated the amendment.

1. This ignores the history and original purpose of the amendment.

2. This ignores the fact that the constitutions of the "reconstructed" states were more democratic and the legislatures were more representative than ever before.

3. Finally, the argument assumes that the amendment was adopted *prior* to "readmission" of the confederate states, thereby providing a legal basis for rejection of constitutions for imperfect legislative apportionment articles.

The last assumption requires a bland innocence of constitutional history. Readmission of most of the confederate states was predicated upon their ratification of the Fourteenth Amendment. Nearly all were, by this process, readmitted before the amendment was law. The last state needed to ratify was South Carolina. Upon its ratification, which took place on July 7 and 8 of 1868, South Carolina was "readmitted" to the union. On July 9, the Secretary of State declared that a sufficient number of states had ratified. Proclamations to this effect were issued on July 24 and July 28. Thus, the state whose apportionment seems

the lone support for the far-fetched conjecture about contemporaneous construction was "back in" the union before a legal basis in fact existed to sustain a challenge of its apportionment. This leaves one possible loophole for the argument, to wit: no state would ratify as amendment which would disallow a provision of its constitution. There is no evidence to suggest so omniscent an attitude by the states in ratifying amendments. If this were true, we probably would never have adopted the Constitution itself, much less the Bill of Rights and the Fourteenth Amendment.

Finally, we have left once again the content of state constitutions accepted on admission since the Fourteenth Amendment. All states admitted since 1868 were first incorporated territories. It is perhaps significant that in all of them, Congress provided in their Organic Acts for apportionment of both houses based on population. This is the only evidence existing of a national policy on legislative representation. Frequently, the organic act incorporated or echoed Sec. 1849 of the Revised Statutes of 1878 (Title 23, Ch. I):

> "The apportionment of representation . . . shall be as nearly equal as practicable among the several districts and counties for such first election of the council and house of representatives, giving to each section of the territory representation in the ratio of its population, except Indians not taxed; and thereafter in such new territory, as well as in all territories now organized, the legislative assemblies, respectively, may re-adjust and apportion the representation to the two houses thereof among the several counties and districts, in such manner from time to time, as they deem just and proper; but the number of either house, as authorized by law, shall not be increased."

The significance of the section is the extent to which its basic proposition was echoed in the original apportionment provisions of states admitted since 1868. Only two

New Mexico and Montana, ignored population in one house, and the resultant disparities in the original state legislature were not egregiously discriminatory. Except for Alaska and Hawaii; both with exceptional geographic problems to consider, based both houses fully or substantially on population. It may be true that these original provisions have not been obeyed, or contained restrictions, such as Oklahoma's limit on total number of members from any county, which made them outmoded over time. The fact remains, however, that at the time of their admission, representation in the states joining the union since 1868 was reasonably related to population—certainly in every instance, more perfectly related than at present.

One final note. Appellants are critical of the Solicitor General concluding his analysis of the idea of equal representation in 1836. This is enough to establish, it seems to us, a basic point. The right of citizens to fair representation was established, well understood and widely acknowledged in state constitutions before the 14th Amendment was adopted. Appellants claim the Amendment created no new right to equality of representation. We respond that such was not necessary in any event, since the right pre-existed the Amendment. It was, and remains imbedded in the national conscience and the idea of government by the consent of the governed. The historical argument fails because it is not historical. It recognizes no antecedents, no context, and no evaluation. It is not history, but historicism.

If an inferred contemporaneous construction of equal protection yields anything, it provides more support to the idea of equality of persons in representation than to the assumption that it somehow condoned malapportionment.

F. The Discriminations in Per Capita Representation Present in the 1963 Amendment Are Haphazard, Crazy-Quilt, and Not Susceptible of Classification and Are Therefore Inconsistent With the Well-Settled Interpretations of the Equal Protection Clause.

1. The Appellees Agree With the General Principle That the Equal Protection Clause Does Not Strike Down Classifications That Have a Reasonable Basis But Deny the Existence in This Case of Reasonable Classifications.

Wholly apart from the propositions of the pronouncements of the scope and interpretation of the Equal Protection Clause, which appear in the Appellants' brief (pp. 88-91), none of which deal with the problem in the instant case, we disagree entirely with the application which the Appellants here seek to make of such principles. In enunciating our disagreement, we feel compelled first to correct certain errors of fact which appear in the argument advanced by the Appellants. The Appellants claim existence of a basic pattern of apportionment for the Delaware General Assembly effected by the 1897 Constitution as amended in 1963. They asserted the basic pattern is that of a federal system of a Senate in which each constituent of the political union is equally represented and a House of Representatives apportioned to population. Firstly, we deny the existence of any pattern of apportionment for the Delaware General Assembly. The apportionment provisions found in the Constitution are arbitrary, geographical selections consisting of 35 representative districts having no relation to size or population and 17 geographical senatorial districts which again had no relation to size of area or population. The pattern is that of a crazy-quilt having no rhyme or reason that is discernible. Merely because a formula can be articulated,

which explains the composition of the Delaware legislative body, does not mean that such articulation or that such formula is reasonable, rational, or permissible according to the Equal Protection Clause.

The second basic error appearing in the brief of the appellants is the argument that the Senate of the State of Delaware is in any way analogous to the Senate or to the Federal senate. The contention is made that according to the provisions of the 1963 amendment, "each county was assigned 7 senators." This is not so. Apportionment of state senators in Delaware, since 1897, has been to specific geographical senatorial districts where senators are elected from the district and not at-large from the county. Identically, the apportionment of representatives in the General Assembly of the State of Delaware has, since 1897, been to specific representative districts, and unlike the federal body which is designed to be highly representative on a population basis, the House of Representatives is so grossly disproportionate on a population basis that but 28% of the population of the State of Delaware select a majority of the members of the House of Representatives. Furthermore, we suggest that according to the 1963 amendment, some 7 representatives will now be apportioned to *districts* which lie within the City of Wilmington. Eighteen will be apportioned to representative *districts* which lie within New Castle County.

At an earlier point in this brief, we have demonstrated gross disparities in voting rights on a per capita basis which exist between inhabitants of the City of Wilmington, as between inhabitants of different representative districts in New Castle County, as between inhabitants of different representative districts in Kent County, as between inhabitants of the different representative districts in Sussex County, and among the inhabitants of the three counties. The disparities exist on a horizontal and vertical basis.

The 1963 amendment when applied to the Senate results in population disparities in New Castle County ranging from 4,177 to 64,820, or a ratio of more than 16 to 1. In Kent County, population disparities range from 7,077 to 46,063, or a ratio of approximately 6½ to 1, and in Sussex County, disparities of 9,580 to 38,000 or better than 4½ to 1.

We think it sufficient under this portion of the brief to reiterate that the District Court below, considering all of the per capita disparities in representation, could find no rational basis for the 1963 amendment. No justification was offered at the trial by the Defendants except for the reliance upon the so-called federal analogy, which was rejected. In the complete absence therefore of any such reasonable classification and justification for the existent disparities, the Court's opinion below must be sustained.

2. There Is No Reasonable Basis for Representation in the Delaware House of Representatives in the Apportionment Scheme Contained in the 1963 Amendment.

The 1963 Amendment to Article II, Section 2 insofar as it relates to the House of Representatives, retains the basic 35 geographical units of representation. It provides for the subdivision of only those larger districts which have a population in excess of 22,501 inhabitants as shown by the last official decennial census. The result of the Amendment insofar as it relates to the House is to leave Kent and Sussex Counties without change. In New Castle County all of the districts having a population under 22,501 remain as they were prior to the amendment. The retention of the smaller districts results in perpetual disparities which under the amendment amount to 7 to 1 in Kent County, 4 to 1 in Sussex County, and 12 to 1 in New Castle County. The apportionment scheme established in 1897 permitted 18.5% of the population to control the House

and 22% of the voters to elect a controlling majority in the Senate. After the 1963 Amendment, the apportionment scheme, which continued in its geographical form, permitted 28% of the population to elect a majority in the House and less than 22% to control the Senate. No justification was offered at the trial for the House provisions. None of the Plaintiffs' witnesses could offer justification for the disparities. None of them could find a rational basis for the differences between districts. Even Dr. James K. Pollock, expert witness produced on behalf of the Defendants, found the distribution of population per representative district illogical and irrational. The Court below was unanimous in their opinion that the Amendment was invalid insofar as it related to the House and no reason appears in Appellants' argument which would compel the overthrow of that unanimity. Furthermore, the Court's decision that the Lower House should be apportioned on strict per capita basis of one man—one vote, has the support of the overwhelming decisions in State and Federal courts since *Baker v. Carr* (see: page 30 of this brief).

3. No Reasonable Classification Under the Equal Protection Clause Is to Be Found in the 1963 Amendment Which Purportedly Reapportioned the Delaware Senate.

The argument presented under this heading of the Appellants' brief (pp. 95-98) consists largely of a rehash of untenable arguments which we have dealt with at earlier places in our brief.

As we understand the so-called other features of the 1963 amendment which relates to the reapportionment of the Senate which are discussed by the Appellants at this point, it is that the designation of floterial senators in Kent and Sussex Counties does not amount to gerrymandering, and that the reapportionment effected by the 1963 amendment, while not perfect, was the best that could be made by the Delaware legislature.

The Court below in the majority opinion found that the two additional senators allotted to Kent County, which had a population in 1960 of but 14.4% of the total population and 2 additional senators to Sussex County, with but 16.6% of the total population, which would give each county an equal status with that of New Castle County with 69% of the population and which received no additional senators constituted a hidden gerrymander (J. S. A. A49).

Judge Layton in the minority opinion agreed with the majority classification that such a result is "sheer gerrymandering" but held that, because in his view the federal analogy was applicable to Delaware, this would not result in an unconstitutionally created body "provided the membership of the lower House is elected on a strict population basis" (J. S. A. A66).

Because of the inseparability of the apportionment provisions in both the Constitution and the Amendment, it is, of course, not necessary to decide whether the act violates the constitution on this ground. Nevertheless, we believe that in the absence of some permissible classification, the Legislature cannot so favor the residents of those senatorial districts located in Kent and Sussex Counties. This Court should find that the inequalities in per capita representation in the Senate is so gross in relation to the objective as to deny equal protection to the Plaintiffs.

The Appellants refer to the population disparities in the several senatorial districts within each county and seek to excuse them on the basis that the legislature had to act hastily. In our opinion, the test of the rationality of a plan cannot depend upon whether a particular plan is or is not the best one that could have been devised. The plan itself must stand the traditional Fourteenth Amendment test of rationality and if, as in the instant case, the plan does not measure up to such tests, it must be held invalid.

The Appellants' reference to the collection of taxes per representative district during the decade of 1952 to 1961 is only a partial recital of the total picture. In the

decade, the State Tax Commission has collected a total of $239,000,000, of which in excess of 92% of the total has been collected in New Castle County, 3% in Kent County and 5% in Sussex County, and yet the County collecting and paying the 92% of the total taxes and containing 69% of the total population of the State finds itself outvoted in the Senate 2 to 1 by the down-state minorities. We do not advocate a government by the wise, the good, and the rich, as suggested in the Appellants' brief (B. M. 98), nor do we advocate the tyranny of the majority any more than we advance the tyranny of the minority. However, this Court cannot avoid, in at least one sense, the support of the political philosophy of one of the parties to this suit. The Appellants' political philosophy is based obviously on the belief of minority rule. Ours is based on the idea that the minority and the majority should be free to form and change; that the system ought not to be closed to any group of the people. We think that all citizens of Delaware should be represented so that the majority will be genuine and the minority will be able to bargain with equality for equal rights. This case is almost the reverse of *MacDougall v. Green*, 335 U. S. 281, where there was an attempt to assure minorities minimal protection in nominating officers since the concentrated masses had practical opportunity to assert their strength at the polls. In Delaware no such practical opportunity exists. The apportionment system forecloses it. Power is improperly diffused and one class is permitted to govern the State forever or to render the government immobile however widespread the demand may be for action. Under the apportionment, whether it be the Constitution of 1897 or the Amendment of 1963, the representatives and senators elected by the minority of the people have held the reins of government secure in their hand for over 66 years. They hold under control all appointments, revenue measures, school construction, highway construction, home rule for municipalities, zoning, election reforms, and a myriad of other incidents of political power.

We, like the Appellants, believe in minority rights, but do not all minorities have equal rights? How, under the equal protection clause, can one minority be singled out from all others and be given perpetual control of a vital part of our state government. This is not a right to power which can be termed a constitutional right; and if this Court reverses the District Court below, it will have given the down-state minority a birth right to the Delaware Senate, and it will issue an invitation to every legislature in America still in minority hands to deny the majority of the state's citizens of their right to participate equally in the government whose laws they must obey and whose composition they can never change.

II.

THE ENTRY OF THE PERMANENT INJUNCTION RESTRAINING THE HOLDING OF ANY ELECTION PERTAINING TO THE GENERAL ASSEMBLY UNDER ARTICLE II, SECTION 2 OF THE CONSTITUTION OF 1897 AS AMENDED WHICH HAD BEEN DECLARED TO BE IN VIOLATION OF THE FOURTEENTH AMENDMENT WAS NOT A GROSS ABUSE OF JUDICIAL POWER BUT WAS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

A. The Injunction Entered by the District Court Was Proper Equitable Relief and Was Not an Abuse of Discretion.

In the decree of April 30, 1963, the Court declared Article II, Section 2 and the Amendment to be both unconstitutional. All that remained to be determined was the form of appropriate relief. It had previously denied the Plaintiffs' Motion for an Injunction restraining the Defendants from conducting the General Election of 1962 insofar as it related to the General Assembly on the ground that the record was then incomplete. After a full trial, how-

ever, the Court was able to determine the relief that it deemed to be appropriate. Under the circumstances existing at that date, April 30, 1963, it appeared appropriate to enter only a declaratory judgment in the hope and expectancy that by October 1, 1963, the General Assembly might adopt a plan of reapportionment under the guide lines appearing in the Court opinion of April 17, 1963. When it became apparent that the Governor of Delaware intended to proceed, in accordance with the advisory opinion of the Delaware Supreme Court, under the provisions of the 1963 amendment, it became obvious that the relief of declaratory judgment alone was no longer appropriate. Under these circumstances, the Court below granted the Plaintiffs' request for an injunction forbidding the Defendants, election officials, from conducting the next general election of 1964 according to the invalid apportionment. The effect of the injunction is to leave to the legislature the opportunity to provide an acceptible substitute for the invalid apportionment provisions by statute. In issuing the injunction (J. S. A. A69), the District Court below expressly reserved jurisdiction to itself to make such further orders as it may deem necessary and proper. This was with the additional hope and expectation that the legislature might take some appropriate action in the light of the Opinion.

The appellants charge, contrary to fact, that the District Court refused to give the General Assembly sufficient time to reapportion the State and that its issuance of an injunction prevented the Amendment of the Delaware Constitution according to the terms of that instrument, which constituted fundamental and vitiating error (App. B. 98-110).

Turning first to the propriety of the injunction, the appellants are overlooking a fundamental of equity which applies with particular reason in the apportionment field as in all areas where the public interest is involved. A Court of Equity cannot act in a vacuum, and having found viola-

tions should afford appropriate relief. Relief is, of course, granted through the formulation of a decree of the Court, and this in turn requires the exercise of discretion which in the public field has an extremely broad application. *Virginia Railroad Company v. System Federation No. 40*, 300 U. S. 545, 552. *Pennsylvania v. Williams*, 294 U. S. 176, 185; *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U. S. 661, 670.

There is no remaining doubt that Courts in apportionment cases have the power to grant appropriate affirmative relief in order to secure the Plaintiffs' constitutional rights. The formulation of an appropriate decree of necessity depends upon the circumstances of each case, and calls upon the Court to exercise a delicate balance.

In this case, the Court repeatedly attempted to be of help and assistance to the General Assembly by staying the proceedings in the hope and expectation that some appropriate action might be taken by the General Assembly, (Order granting Limited Stay, July 25, 1962, J. S. A. A1-A5); by making it plain that it had no desire to substiute its judgment for the collective wisdom of the General Assembly whose primary duty it was to apportion itself (Opinion Overruling Motion to Dismiss, August 7, 1962, J. S. A. A6-A8); and by reiterating that the questions which were of the gravest importance to the citizens of Delaware should be decided only upon a full record (Opinion Denying Preliminary Injunction and Further Stay, October 16, 1962, J. S. A. A8-A13). Finally, after holding the provisions of apportionment to be unconstitutional it granted the legislature an additional five months to October 1, 1963, to fulfill its duties by preparing and enacting into law a reapportionment statute acceptable under the law and the guide lines the Court had endeavored to lay down in its final Opinion (April 17, 1963, J. S. A. A16-A56).

The course pursued by the Court below in encouraging the State legislature to reapportion itself is one that has been uniformly followed in other federal and state courts.

A review of those cases show that the action of the District Court was a proper exercise of its jurisdiction rather than a gross abuse of judicial power.

The Court below first delayed deciding the issue of constitutionality of the apportionment in order to give the legislature time to act. 207 F. Supp. 205. This was consistent with *Lein v. Sathre*, 205 F. Supp. 536, 540 (D. N. D.); *Magraw v. Donovan*, 163 F. Supp. 184, 187-188 (D. Minn.); *Mikell v. Rousseau*, 183 A. 2d 817, 823 (Vt. Sup. Ct.); *Asbury Park Press, Inc. v. Woolley*, 33 N. J. 1, 161 A. 2d 705, 714-715; *In re Legislative Reapportionment*, 374 P. 2d 66, 71-72 (Colo. Sup. Ct.); *Butcher v. Trimarchi*, 28 Pa. Dist. & County Rep. 2d 537, 542.

The Delaware General Assembly ignored the opportunity granted by the District Court, and the District Court thereupon further delayed entering a final decree until the legislature should have time, five more months, to make a new apportionment satisfying the requirements of equal protection. This course was consistent with the following cases: *Sobel v. Adams*, 208 F. Supp. 316, 318 (S. D. Fla.); *Toombs v. Fortson*, 205 F. Supp. 248, 259, and unreported opinion, September 5, 1962, U. S. D. C. (N. D. Ga.); *Baker v. Carr*, 206 F. Supp. 341, 349, 350-351 (M. D. Tenn.); *Moss v. Burkhart*, 207 F. Supp. 885, 894, 898-899 (W. D. Okla.); *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189, 195-196 (D. Neb.); *Mann v. Davis*, 213 F. Supp. 577, 585-586 (E. D. Va.), pending on appeal, No. 69, this Term; *Thigpen v. Meyers*, 211 F. Supp. 826, 832 (W. D. Wash.), pending on appeal, No. 381 this Term; *Maryland Committee for Fair Representation v. Tawes*, Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962; *Harris v. Shanahan*, District Court, Shawnee County, Kansas, decided July 26, 1962; *Fortner v. Barnett*, No. 59,965, Chancery Court, First Judicial District, Hinds County, Mississippi.

In the instant case, the failure of the legislature to enact appropriate apportionment provisions coupled with

the Governor's proclamation in which he proceeded under the provisions found to be unconstitutional by the District Court, compelled the Court to take further action. Thus, the Court entered the injunction which restrained the Defendants from proceeding under the provisions of the amendment which had been found to be in derogation of the equal protection clause. In so doing, the Court did not enter a final measure, but as we have noted, reserved jurisdiction to itself to make such further orders as might be necessary and proper under the circumstances. We think the clear intent of such provisions is that if the legislature would enact appropriate legislation to provide for reapportionment, the injunction would be removed. We think it equally clear that in default of appropriate legislation, the Court has reserved unto itself the right to grant further relief, including a judicial reapportionment, which would be consistent with the course that has been taken in *Fortner v. Barnett*, 59,965, Chancery Court, First Judicial District, Hinds County; *Sims v. Frink*, 208 F. Supp. 431 (M. D. Ala.), pending on appeal, sub nom. *Reynolds v. Sims*, Nos. 23, 27, 41, this Term; *Moss v. Burkhart*, 207 F. Supp. 885, in unreported Opinion July 16, 1963 (W. D. Okla.).

Thus, the entry of the injunction follows the traditional relief that Courts of Equity grant in the exercise of their discretion.

B. There Is Nothing in the Record Below to Justify the Hysterical Harangue in the Appellants' Brief Which Charges the Members of the Court Below With Undue Pressure, Haste and Compulsion on the Appellants.

We now turn more fully to the unwarranted charge that the three distinguished judges of the Court below engaged in a continuous course of urgency, haste and pressure that is supposedly wholly at variance with the standards prescribed by this Court for litigation involving

a State of the Union (App. B. 98 et seq.). This baseless invention of wild imagination of the Appellants can not, of course, stand unchallenged as regretable as the need for such rebuttal appears.

This action was brought under the provisions of Title 28 U. S. C. Section 2284 as an action required by an Act of Congress to be heard and determined by a district court of three judges. In paragraph 4 of Section 2284, it is provided:

> "In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application."

The complaint in this case was filed on June 5, 1962. It attacked the validity of the provisions of the constitution which related to the apportionment in both houses of the General Assembly of the State of Delaware. In November, 1962, the entire membership of the House of Representatives was to be elected and one-half of the Senate. The primary election which preceded the general election was schduled to be held on August 18, 1962, making it necessary to take certain preliminary steps by Saturday, August 4, 1962.

Shortly after the suit was instituted a bi-partisian committee was appointed by the Governor to recommend a plan of reapportionment of the General Assembly and a plan to convene a constitutional convention. On July 27, 1962, that committee recommended a constitutional amendment to Article II, Section 2 by act of the General Assembly passed in time to comply with the publication provision of the constitution followed immediately by the enactment of legislation which would accelerate the date on which a constitutional convention might be held to the middle of 1963. The report of the committee and the proposed legis-

lation were the foundation for the plea of the Defendants for a stay in these proceedings.

On July 25, 1962, the Court, having heard various Motions to Stay and to Dismiss, noted that if the General Assembly was to accomplish the amendment and the constitutional convention it would have to act prior to August 4, 1962. In its opinion the Court referred to these matters and while not expressing an opinion regarding the validity of the proposed legislation, commented that in the light of *Baker v. Carr*, 369 U. S. 186 there was a possibility that the proposed legislation might contravene the Fourteenth Amendment. Under such circumstances the Court, in an endeavor, again, to be helpful to the legislature, suggested that as a "temporary harbor" and not as a "permanent haven" the General Assembly might provide that reapportionment be by statute. In such spirit it granted a stay in the proceedings until August 7, 1962 in the hope and expectation that some appropriate action might be taken by the General Assembly.

This is precisely the same suggestion which was given by the Maryland Court of Errors and Appeals in the *Maryland Committee For Fair Representation, et al. v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962) p. 670.

On August 2 the Court conducted an argument on certain Motions To Dismiss and To Further Stay The Proceedings. On August 7 it handed down an opinion overruling the motions and stated:

> "We wish to make it plain that we have no desire to substitute our judgment for the collective wisdom of the General Assembly of Delaware whose primary duty it is to assure the electors of this state apportionment provisions to meet the tests laid down by the Supreme Court of the United States in Baker v. Carr, but in the light of all the circumstances we have no alternative but to proceed promptly." (J. S. A. A8)

By August 7, 1962 it was apparent that the efforts of the Court to be of help to the General Assembly had been ignored and that the General Assembly intended to reapportion by amendment to Article II, Section 2.

The record shows that on August 7, 1962 the defendants filed a Motion For a Further Stay in the proceedings and that on the following day the plaintiffs filed a Motion for a Preliminary Injunction to enjoin the defendants from conducting the general election scheduled for November 6, 1962 insofar as it pertains to the election of members of the General Assembly, and for trial. A brief schedule was fixed by order on both motions and oral argument set for August 29, 1962. This order was further extended to provide for argument on the Motion For Preliminary Injunction on September 17, 1962. Numerous affidavits and briefs were filed on behalf of all parties. Argument was held on September 17, 1962 and both sides filed Proposed Findings of Fact and Conclusions of Law on the Motions for Preliminary Injunction and For a Further Stay. On October 16, 1962 the Court denied both motions.

In denying the Motion For Preliminary Injunction, the Court stated that:

> "The suit at bar was filed on June 5, 1962 and has been proceeded with with a celerity consonant with the importance and intricacy of the issues involved. We cannot find on this record that the plaintiffs and others situated like unto them will suffer irreparable damage if we do not enjoin the election of November 6, 1962 insofar as it relates to the election of members of the General Assembly. On the contrary, if we enjoin the election of November 6, 1962, we will have to substitute, in lieu of the provisions of Section 2 of Article II, an apportionment plan, election laws or rules and regulation devised by ourselves. Though the plaintiffs have suggested a plan for equalization of franchise the subject is one which requires careful study, further devel-

opment by expert witnesses and the opportunity for extensive cross-examination by the parties and exploration by the court. A different and new apportionment system perhaps cannot be devised as quickly and as simply as the plaintiffs assert. If we were to enjoin the forthcoming election of November 6 for members of the General Assembly to be held under present constitutional provisions without substituting therefor an adequate redistricting plan and clear and sufficient instructions to the defendants in the instant case it would have a most disastrous effect and might deprive large numbers of electors of the State of Delaware of their franchise on November 6 to elect members of the General Assembly. This we will not do. On this ground alone, if there were no other, we would deny the application for a preliminary, or interlocutory, injunction." (J. S. A. A14-A15)

This comment of the Court is consistent with the repeated statements of Judge Biggs to the effect that this was the most important case that he had sat in during his more than twenty-five years on the federal bench. It is ironical that in such a case we find that the words of caution and advice of an outstanding jurist are twisted and construed in the context in which we find them in the Appellants' brief.

On November 13, the parties met with the three judge Court after having prepared an extensive pre-trial order. This was most carefully examined by the Court which, after conferring with counsel on November 21 set the case for trial two months later on January 21, 1963.

This five day trial resulted in the opinion on the merits of April 17, 1963, where once again, instead of the supposed haste and pressure asserted by this Court on the General Assembly, the Court reiterated its reluctance to assume the task of reapportionment and restated its desire that time be given to the Legislature to accept its responsibility (J. S. A. A50).

"But a further opportunity must be given to the General Assembly of Delaware to work out the problem of reapportionment. We acknowledge the difficult problem faced by the General Assembly of Delaware in attempting to frame a reapportionment statute that will meet the guarantee of the Equal Protection Clause of the Fourteenth Amendment. Therefore, we believe it to be within the permissive bounds of propriety for a Court laboring in this field to state what it considers to be the minimal constitutional requirements under Baker v. Carr and the adjudications which have grown out of it." (J. S. A. A51)

After laying down guide lines for the General Assembly, a course requested of the Court below by counsel for the Defendants below, the Court reiterated

"We say again as we have stated in this opinion and other opinions in this case and during the course of the trial, that the primary duty of apportionment must rest with the General Assembly. This Court should not be compelled to embark upon the task of reapportionment because of legislative reluctance. The good of the state requires careful, even prayerful, study of all relevant factors and circumstances in the consideration of whole state interest, and a well-devised, reasonable and fair plan of apportionment. * * * (J. S. A. A54). We state again that this Court has not the slightest desire to deprive the citizens or the General Assembly of this State of their rights, nor have we any desire to assume their responsibility.

IV

"The State of Delaware, the General Assembly and this Court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us. We will allow a reasonable period for the General Assembly to proceed to try its hand again at the problem of reapportionment.

"* * * We, of course, will allow the General Assembly a reasonable time in which to fulfill its duties. Accordingly, we will allocate to the General Assembly a period of time from the date of the entry of our final decree[20] up to and including October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guide lines we have endeavored to lay down herein."

October 1, 1963 passed without any reapportionment. It is now the end of November, 1963. The General Assembly of the State of Delaware has been in session almost continuously for the entire year of 1963 and yet nothing tangible has resulted in the field of reapportionment. This is consistent with the futile efforts that have been made prior to the institution of this suit to effect reapportionment. In the six years prior to suit, the General Assembly of Delaware received seven bills having reapportionment as their objectives. With one exception, all failed to come out of Committee. The exception was soundly defeated (Sincock App. 18A).

The Delaware General Assembly simply will not reapportion itself and it is unrealistic to expect it to do so. Moreover, there being no initiative or referendum in Delaware, the people are without relief, absent this Court's help. It is a mockery to plead here that the District Court below had refused to give the Delaware General Assembly sufficient time to reapportion itself. The history of the inactivity of the General Assembly itself makes such statements an invention of Appellants' counsel's wildest imagination.

Finally we suggest to the Court that the rights of the Plaintiffs in this case are of a character similar to the rights asserted in *Watson v. City of Memphis*, 373 U. S. 526, where the Court stated:

"The rights here asserted, are, like all such rights, *present* rights; they are not merely hopes to some

20. The final decree was entered on April 30, 1963.

future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (Original emphasis.)

We see a sharp contrast in the rights asserted here and in the *Watson* case, *supra*, to the rights to enforce a money judgment against a sister state asserted in *Virginia v. West Virginia*, 241 U. S. 531.

We have shown here that the Court below is required under the provisions of Title 28, U. S. C., Section 2284 to give precedence to the application of the Plaintiffs who sought to enjoy the present rights denied them, and was required by such section to assign this cause for a hearing at the earliest practicable day. The record shows the constant concern of the Court that reapportionment remain the responsibility of the Legislature and that it afforded the legislature every conceivable opportunity to effect a proper plan. It is clear that it was the refusal of the General Assembly to accept its responsibility rather than supposed haste of the Court that has provoked the present difficulties which continue to deny the Plaintiffs their present rights under the Equal Protection Clause.

The record therefore does not substantiate the charge of compulsion, haste and urgency, and we suggest that the eminent counsel who prepared the Appellants' Brief, not having participated in the trial below, and not having had the advantage of observing the demeanor of the Court or the pace of the proceedings, has misjudged a few excerpts from the record and is far from the mark of actuality.

C. Neither the Decree Nor the Injunction Below Prevent the General Assembly of the State of Delaware From Enacting Appropriate Apportionment Provisions Which Would Meet the Tests of the Equal Protection Clause.

As we have shown, the final decree of April 30, 1963 declared both the constitutional provision and the amendment to be invalid under the Fourteenth Amendment. The Court reserved: "jurisdiction to itself to make such further orders as it may deem necessary and proper, * * *" (J. S. A. A68). Thereafter, under the reservation of jurisdiction, the Court below issued its injunction of May 20, 1963 restraining the defendants from conducting any election which pertained to the General Assembly under the apportionment provisions of the constitution of 1897, and the amendment thereto. The Appellants claim that the combination of the decree and injunction prevent an amendment to the Delaware Constitution in accordance with its terms and therefore constitutes a gross abuse of judicial power (App. B 104 et seq.).

We have previously shown that the combination of a declaratory judgment followed by an injunction is a form of relief that is well known in equity and in particular in the apportionment field, and that the District Court had a broad discretion under the circumstances we have noted. This is clearly not an abuse of judicial power.

Moreover it is within the express power of the General Assembly of the State of Delaware to place itself and all future General Assemblies of the state in a position where the Constitution of 1897 may be amended. If there is a paralysis extent in the General Assembly today it is not the result of a decree and injunction but is instead a self-inflicted paralysis which the Delaware General Assembly can remove if it so desires.

The Court below suggested the reapportionment as a temporary haven could be constitutionally accomplished by

means of a statute. Thus the first step that we suggest in the removal of any self-imposed paralysis would be the adoption of statutory apportionment provisions which would meet the tests of the Fourteenth Amendment.

If however the General Assembly in its collective judgment, is of the opinion that apportionment provisions belong in the constitution of the state rather than in a statute two additional courses are open to it.

It may incorporate in the form of an amendment to Article II, Section 2 the statutory provisions of apportionment of the General Assembly. It may then enact, as the first leg of amendatory proceedings, those statutory provisions into a constitutional amendment. After the general election of 1964, made possible by the enactment of statutory apportionment provisions, the next General Assembly may adopt the amendment as a constitutional enactment and the statutory provisions will become a part of the constitution.

However, if the present legislature wishes to proceed by way of a constitutional convention, it may propose along with the statutory apportionment provisions an amendment to Article XVI of the Constitution of 1897 which would provide for a constitutional convention to be composed of the delegates who shall be elected in accordance with the proposed amendatory provisions of Article II, Section 2.

If this is done by the present legislature and approved by the next General Assembly following the general elections of 1964, Article XVI providing for delegates for a convention will be coordinated with the amendment to Article II, Section 2 providing for the apportionment of the General Assembly thus clearing the way for a constitutional convention in accordance with the reapportioned provisions of the constitution.

Thus the combination of the decree and injunction below, is not only a form of relief which is proper in such cases as this, but their combined effect in no way precludes

the General Assembly from amending the Constitution of 1897 to provide for either the apportionment of the General Assembly or for the convening of a Constitutional Convention.

D. The Record Shows No Compulsion of the District Court to Apportion the Delaware General Assembly by Decree—to the Contrary It Shows the Court's Reluctance to Accept Such Burden—Until Requested by the Defendants to Establish Guide Lines.

There is no substance to the ad hominem contention made by the Defendants that the Court below desired to affect reapportionment of the Delaware General Assembly by judicial decree. Throughout the proceedings the Court in the "hope and expectation" that some appropriate action might be taken by the General Assembly, proceeded with extreme caution towards the defendants (J. S. A. A5, A8, A13). The Court recognized that it was the primary duty of the General Assembly to enact appropriate apportionment provisions in accordance with the test of *Baker v. Carr* (J. S. A. A8). It stayed the proceedings to permit the General Assembly to take such action as it deemed appropriate by way of amendment and refused to enjoin the election of November 6, 1962, as requested by the plaintiffs.

Even as late as April 17, 1963 it reiterated what had been stated in the prior opinions and during the course of trial that "the primary duty of apportionment must rest with the General Assembly. This Court should not be compelled to embark upon the task of reapportionment because of legislative reluctance." To provide such an opportunity the Court in order to permit the General Assembly to try its hand again at the problem of reapportionment allocated to the General Assembly a period of time from the date of the entry of its final decision of April 30, 1963 to October 1, 1963 to prepare and enact into law a reapportionment statute acceptable under the law and the guide lines the

court endeavored to lay down in its opinion (J. S. A. A54-A56).

Thus the Court extended an additional five months to the Delaware legislature to proceed in good faith to reapportion itself. The Appellants complain that the General Assembly was not given more time for deliberation. They do not refer to the fact that the final decree was handed down approximately ten months after the suit was filed or that the Court extended an additional five months for the reapportionment to be affected by the General Assembly. They now state, however, "that a more perfect apportion could easily be formulated" and that once this Court has established guide lines there is nothing to indicate that the Delaware General Assembly would be "unable" to effect a reapportionment consistent with the constitution of the United States (App. B pp. 108-109). One wonders why a plan so easily formulated with proper guide lines has not been enacted prior to this date by the Delaware General Assembly.

The thrust of the appellants' argument in large measure constitutes a vicious and unwarranted attack upon the judges who sat below. Statements that, at the very outset of the litigation, the District Court undertook to advise the General Assembly how it should amend the constitution and then publicly regretted that its gratuitous advise had not been followed; the comment which related to reapportionment plan suggested by the Court and the plaintiffs are all designed to leave the inference with this Court that in some improper manner the Court below was seeking to inject into the proceedings a matter that was not properly an issue. Nothing could be farther from the actual fact.

A review of the pre-trial order will show that the defendants agreed with the plaintiffs that one of the issues of law and fact which remained to be litigated was "What plan of reapportionment, if any, should be adopted?" (P. T. O. para. 13, Facts D-E, p. 29). At the pre-trial conference, the plaintiffs advised the defendants and the Court that it ex-

pected to present a plan for reapportionment. Rather than being invited by the Court to present such a plan, the plaintiffs announced well in advance of trial that they intended to produce the same.

Furthermore, the record is also replete with comment and colloquy showing that all of the parties knew that a plan would be presented by the plaintiffs and that the Court would be requested to lay down guide lines which it considered to be appropriate. A portion of such colloquy appears in the record as follows:

"Frank O'Donnell, Esquire, attorney for the Department of Elections for New Castle County and the Clerk of Peace for New Castle County:

"Judge Biggs: Let me ask you one question in connection with your objection. Assume this Court should find that the new amendment is unconstitutional in the light of the 14th Amendment of the United States Constitution, what then would you conceive it would be the duty of the Court to do?

"Mr. O'Donnell: I would now be stating my views, I have not consulted——

"Judge Biggs: Give us your views.

"Mr. O'Donnell: *My views are that if the Court should find that to be unconstitutional, that the Court should issue a mandate requiring the State to be redistricted in accordance with certain criteria, the lines to be adopted by the Legislature.* I think the Court might properly in its order give a reasonable time for compliance with the Court's order. If the Court finds that the order is not complied with, then more drastic measures might be in order, but that is the basis of our objection, that this question is not before the Court.

"Mr. O'Donnell: Yes. That is my idea of what we were referring to in Paragraph 13. I did not think and I still do not think that the fine lines of how the districts

should be drawn is the function of the Court. *I feel that and I thought then that you were ultimately giving a decision where you would give us the general guides that you thought were appropriate* and not the fine lines on the map of where the districts should be.

"Consequently we have not and did not prepare any testimony in opposition to the lines as laid down this afternoon. (Emphasis supplied; Sincock App. 73a, 74a)

"Januar D. Bove, Jr., former Attorney General, attorney for the State Election Commissioner, and the Department of Elections for Sussex County:

"Mr. Bove: May it please the Court, your Honors will recall that at the pre-trial conference counsel for the defendants did raise the question of the Court's proceeding by analogy to a patent case where the Court finds either infringement or validity or both and then goes into a hearing on damages. *We had suggested that if the Court found either Article 2 of Section 2 or House Bill 574 and also House Bill 3 unconstitutional in any respect, that the Court establish some guide lines on apportionment and then hold a hearing on the form of relief to which the plaintiffs would be entitled if the Court found unconstitutionality.* The Court did at the pre-trial reject that suggestion.

"During the course of these proceedings, if your Honors will recall, I renewed our application in that respect and your Honors reserved decision on it, as I understood it. Do I now understand that your Honors are denying that application?

"Judge Biggs: No. That was an oral application, was it not?

"Mr. Bove: Yes, sir.

"Judge Biggs: Mr. Bove, I would think it would be desirable, since the record has not yet been written,

and at least I am not entirely clear as to what your motion was, if you presented it now or presented it during the course of the next 48 hours by way of a written motion.

"Mr. Bove: Yes, your Honor." (Emphasis supplied; Sincock App. 75a)

The Court's opinion which established the guide lines was the result not only of the request of the Defendants' counsel but was also requested by the Plaintiffs as will appear from the following:

"Mr. Theisen: * * *. It certainly was my understanding, if your Honors please, that a pre-trial order was agreed to in these proceedings. It was my understanding before I went to the expense and time and work involved in presenting a plan for reapportionment that that matter was four-squarely before this Court and was known by the defendants all the time to be before this Court. We have brought experts here and we have litigated that question. They have brought experts here and they have litigated that question, and to state at this late hour that they did not realize that lines were to be drawn, when as long ago as last Tuesday we presented our plan with the lines drawn which we had told them we would present and told the Court in advance we would present, to state at this late hour that they are not now prepared is something quite frankly, your Honor, which shocks me, and I cannot let this occasion go by without stating my surprise." (Tr. 745)

And so instead of indicating any judicial compulsion to reapportion by decree, the record proves the contrary to be true. It establishes the recognition of the Court that it is the primary duty of the Legislature to apportion itself, and affirms the reluctance of the Court to assume such a burden. It also shows that, although the question of what

kind of a plan of reapportionment should be adopted, if any, was raised by the Plaintiffs, and the Plaintiffs in fact presented a plan, the Court did not effectuate any plan. To the contrary, the Court below, at the request of Appellants' counsel laid down "criteria, the laws to be adopted by the legislature; the general guides" which it thought appropriate for Legislature consideration.

CONCLUSION.

For the foregoing reaso., the Judgment below should be affirmed.

Respectfully submitted,

VINCENT A. THEISEN,
Counsel for Appellees.

Dated: November 29, 1963.

Proof of Service.

I, VINCENT A. THEISEN, the Attorney for the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of November, 1963, I served copies of the foregoing Brief of the Appellees and the Appendix thereto upon the Appellants by delivering two copies of the same upon Frederick Bernays Wiener, at his suite, 815 Stoneleigh Court, 1025 Connecticut Avenue, N. W., Washington, D. C. and by mailing three copies thereof, in a duly addressed envelope, with first class postage prepaid, to Januar D. Bove, Jr., Beneficial Building, Wilmington, Delaware, and by mailing a copy of said Brief and Appendix in a duly addressed envelope, with first class postage prepaid, to the Honorable David P. Buckson, 225 South State Street, Dover, Delaware, to Honorable E. Norman Veasey, Public Building, Wilmington, Delaware, to James H. Hughes, III, 325 South State Street, Dover, Delaware, to Frank O'Donnell, 350 Delaware Trust Building, Wilmington, Delaware, and to N. Maxson Terry, 48 The Green, Dover, Delaware.

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